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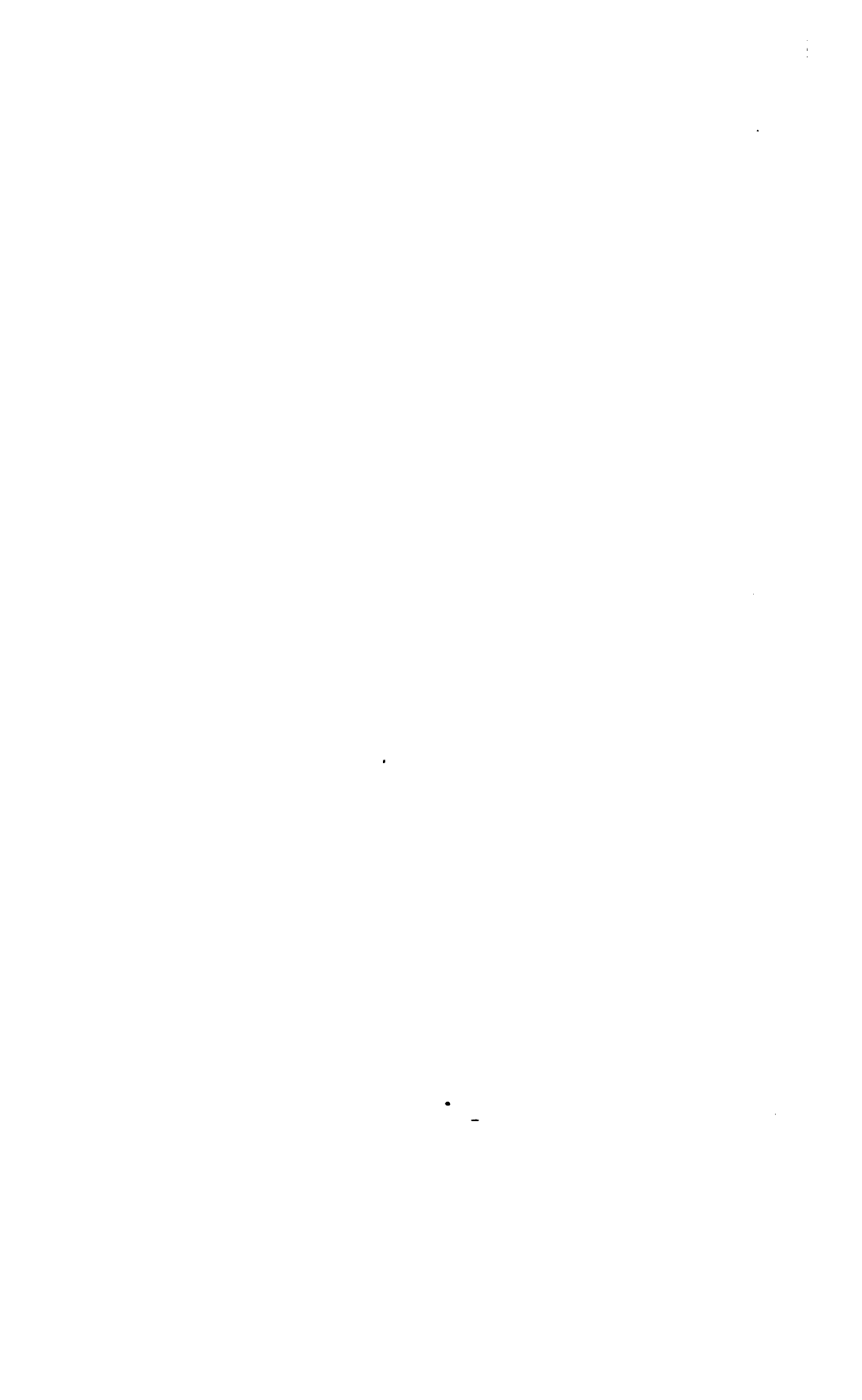
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PLEAS OF THE CROWN

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WITH A TABLE OF THE PRINCIPAL MATTERS.

First American Edition.

WITH NOTES AND REFERENCES TO LATER CASES

BY

W. A. STOKES AND E. INGERSOLL

OF THE PHILADELPHIA BAR.

IN TWO VOLUMES

VOL. II.

Philadelphia:

ROBERT H. SMALL 25 MINOR STREET.

1847.

Entered according to act of Congress in the year 1847, by
ROBERT H. SMALL,
In the office of the Clerk of the District Court of the Eastern District of
Pennsylvania.

TABLE OF ABBREVIATIONS.

A.	C.
A. & E., } Adolphus & Ellis Reports, Ad. & El. { (King's Bench).	Caines, Reports, (New York).
A. & E., (N. S.) Adolphus & Ellis, New Series.	Cald., Caldecot Settlement Cases, (King's Bench).
Addams, Reports, (Ecclesiastical).	Call, Reports, (Virginia).
Add., Addison's Reports, (Pennsylvania).	Camp., Campbell Reports, (Nisi Prius).
A. K. Marsh., Marshall Reports, (Kentucky).	Cam. & Nor., Cameron & Norwood Reports, (N. Carolina.)
Am. Jur., American Jurist.	Car. C. L., Carrington's Criminal Law.
Anstey, Constitution of England.	C. & K., Carrington & Kirwan Reports, (Nisi Prius).
Anst., Anstruther Reports, (Exchequer).	C. & M., Carrington & Marshman Reports, (Nisi Prius).
Andr., Andrews Reports, (King's Bench).	C. & P., Carrington & Payne Reports, (Nisi Prius).
Arch., Cr. L. } Archibold Criminal Plead.	Car. Law Repos., Carolina Law Repository.
Arch., C. P. { ing.	Carth., Carthew Reports, (King's Bench.)
Arch. P. Q. B., Archbold Practice in the Queen's Bench,	Charlt., Charlton Reports, (Georgia).
Ash., Ashmead Reports, (Pennsylvania).	Chip. Chipman Reports, (Vermont).
B.	Chit. Col. Stat., Chitty's Collection of Statutes.
Bac. Abr., Bacon's Abridgment.	Chit. C. L., Chitty's Criminal Law.
Bail., Bailey Reports, (South Carolina).	" Reps., " Reports.
Bald., Baldwin Reports (United States, 3d Circuit.)	Cl. & Fin., Clark & Finnolly Reports, (House of Lords.)
B. & Ad., Barnewell & Adolphus Reports, (King's Bench).	Clayt., Clayton Reports.
B. & Al., Barnewell & Alderson Reports, (King's Bench).	Cobb. St. Tr., Cobbett State Trials.
B. & C., Barnewell & Creswell Reports, (King's Bench).	Com. Dig. Comyn's Digest.
Barr., State Reports, (Pennsylvania).	Comb., Comberbach Reports, (King's Bench).
Bay, Reports, (South Carolina).	Cond. R., Condensed Rep. . . . (Supreme Court United States).
Bibb, " (Kentucky).	Conf. R., Conference Reports, (North Carolina).
Bing., Bingham Reports, (Com. Pleas.)	Conn., Connecticut Reports.
Bing. N. C., Bingham New Cases, (Com. Pleas.)	Const. R., Constitutional Reports, (South Carolina).
Binn., Binney Reports, (Pennsylvania).	Cooke, Reports, (Tennessee).
B. & P., Bosanquet & Fuller Reports, (Com. Pleas, &c.)	Coxe, Reports, (New Jersey).
Brayt., Brayton Reports, (Vermont).	Cow., Cowen Reports, (New York).
Breese, Reports, (Illinois).	Cranch, Reports, (Supreme Court United States).
Brevard, Reports, (South Carolina.)	Crompt., Crompton's Justice of the Peace.
Br. Ab., Brooke's Abridgment.	
Brock. C. C., Brockenbrough Reports, (United States 4th Circuit).	D:
B. & B., Broderip & Bingham Reports, (Com. Pleas.)	Dall., Dallas Reports, (Pennsylvania).
Br., Browne Reports, (Pennsylvania).	Dalt., Dalton's Justice of the Peace.
Bull. N. P., Buller's Nisi Prius.	Dana, Reports, (Kentucky).
Bulst., Bulstrode Reports, (Jac. 1 & Car. 1.)	Dane Abr., Dane's Abridgment.
Burn, Justice of the Peace and Parish Officer.	Davis Virg. C. L., Criminal Law of Virginia.
Burr., Burrow Reports, (King's Bench).	Day, Reports, (Connecticut).
	Deac. Abr., } Deacon's Abridgment of
	Deac. C. L. { the Criminal Law.

Denio, Reports, (New York).
 Dev., Devereux Reports, (North Carolina).
 Dev. & Bat., Devereux & Battle Reports, (North Carolina).
 Dougl., Douglas Reports, (King's Bench).
 Dow, Reports, (House of Lords).
 Dowl. P. C., Dowling's Practice Cases.
 Dowl. (N. S.) " " (New Series).
 D. & L., Dowling & Lowndes, (Practice Cases).
 D. & R., Dowling & Ryland, (King's Bench).
 D. & R. M. C., Dowling & Ryland Magistrate's Cases.

E.

East, Reports, (King's Bench).
 East, P. C., Pleas of the Crown.
 Elm. Dig., Elmer's Digest of Laws, (New Jersey).
 Esp. R., Espinasse Reports, (Nisi Prius).

F.

Fitz. Ab., Fitzherbert's Abridgment.
 Fonbl. Eq., Fonblanque's Equity.
 Fost. Disc., {
 Fost. R. { Foster's Crown Law.

G.

Gale & D., Gale & Davidson Reports, (King's Bench &c.).
 Gall. C. C., Gallison Reports, (United States 1st Circuit).
 G. & J., { Gill & Johnson Reports,
 Gill & Johns. { (Maryland).
 Gilpin, Reports, (United States District Court of Pennsylvania).
 Glan., Glanville, (de legibus, &c.).
 Gow, C. N. P., Cases at Nisi Prius.
 Grattan, Reports, (Virginia).
 Green, Reports, (New Jersey).
 Greenl. on Ev., Greenleaf on Evidence.

H.

Hagg., Haggard Reports, (Admiralty).
 Halst., Halsted Reports, (New Jersey).
 Ham., Hammond Reports, (Ohio).
 Harper, Reports, (South Carolina).
 Harringt., Harrington Reports, (Delaware).
 Har. & J., Harris & Johnson Reports, (Maryland).
 Har. & McH., Harris & McHenry Reports, (Maryland).
 Hardin, Reports, (Kentucky).
 Harg. St. Tr., Hargrave's State Trials.
 Hardw., Reports tempore Hardwicke.
 Hawks, (N. C.) Reports, (N. Carolina).
 Hawks., {
 Hawks, P. C. { Hawkins Picas of the Crown.

Hay., Haywood Reports, (North Carolina).
 Humph., Humphrey Reports, (Tennessee).
 H. Blacks., Henry Blackstone's Reports, (Com. Pleas, &c.).
 Hill, Reports, (New York).
 Hill, (S. C.) Reports, (South Carolina).
 Hob., Hobart Reports.
 How., (Miss.) Howard Reports, (Mississippi).
 Howard, Reports, (United States Supreme Court).
 How. St. Tr., Howell's State Trials.

I. J.

Iredell, Reports, (North Carolina).
 Jebb's Ca., Cases (King's Bench of Ireland).
 Jebb & Sy., Jebb & Symes Reports, (ib.)
 Jenk., Jenkins Centuries.
 Jerv. Arch. C. L., Archbold's Criminal Pleading, (Jerviss' edition).
 Johns., Johnson Reports, (New York).
 Jur., The Jurist, (London).

K.

Keb., Keble Reports, (King's Bench).
 Keilw., Keilway Reports.
 Kely., Kelyng Reports.

L.

Lamb., { Lambard's (Eirenarcha)
 Lamb. Eiren., { Justice of the Peace.
 Law J. (N. S.) M. C., Law Journal (New Series) Magistrate's Cases.
 Ld. Raym., Lord Raymond Reports.
 Leach., { Leach, Crown Cases
 Leach, C. C., { Reserved.
 Leigh, Reports, (Virginia).
 Lew., {
 Lew. C. C., { Lewin Crown Cases
 Lew. C. C. R., { Reserved.
 Leon., Leonard Reports.
 Lev., Levinz Reports.
 Lond. Law Mag., London Law Magazine.
 Lond. Jur., London Jurist.

M.

Mad. R., Maddock Reports, (Chancery).
 Man. & G., Manning & Granger Reports, (Common Pleas).
 Man. & Ry., Manning & Ryland Reports, (King's Bench).
 Mart. & Yerg., Martin & Yerger Reports, (Tennessee).
 Marsh., Marshall Reports, (Kentucky).
 Mason, Reports (United States 1st Circuit).
 Mass., Massachusetts Reports.
 Mass. Com. Rep., Massachusetts Commissioners' Report.

TABLE OF ABBREVIATIONS.

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Math. Dig. C. L., Matthews' Digest of Criminal Law.	Q.
MS. Summ., Manuscript Summary, (Hale).	Q. B., Queen's Bench.
M. & Rob., Moody & Robinson Reports, (Nisi Prius).	R.
M. & S., Maule & Selwyn Reports, (King's Bench).	Railw. Cas., Railway Cases.
M. & W., Meeson & Welsby Reports, (Exchequer).	Rand. Va. R., Randolph Reports, (Virginia).
M'Cord, Reports, (South Carolina).	Rawle, Reports, (Pennsylvania).
McLean, Reports, (United States 7th Circuit).	Rawle on Cons., Rawle on the Constitution.
Meigs, Reports, (Tennessee).	R. S., Revised Statutes.
Metc., Metcalf Reports, (Massachusetts).	R. L., Revised Laws.
Minor, Reports, (Alabama).	Rep. Con. Ct., Reports in the Constitutional Court, (South Carolina).
Miss. Reps., Missouri Reports.	Rice, Reports, (South Carolina).
Mod., Modern Reports, (King's Bench, &c.).	Rol. Abr., Rolle's Abridgment.
Mood. } Moody Crown Cases Re-	Rol. Rep., " Reports.
Mood. C. C. } served.	Rosc. Cr. Ev., { Roscoe on Criminal
M. C. C. R. }	Rosc. on Crimes, { Evidence.
Moreh. & Br., Morehead & Brown Digest, (Kentucky Laws).	Root, Reports, (Connecticut).
M. & M., } Moody & Malkin Re-	Russ., { Russell on Crimes and
Mood. & Mal. } ports. (Nisi Prius).	Russ. C. & M. } Misdemeanors.
Monr., Monroe Reports, (Kentucky).	R. & R., { Russel & Ryan, Crown
Munf., Munford Reports, (Virginia).	R. & R. C. C., { Cases Reserved.
Murph., Murphy Reports, (North Carolina).	R. & M. C. C., { Ryan & Moody Crown
	R. & M. C. C. R. } Cases.
N.	S.
N. Hamp., New Hampshire Reports.	Salk., Salkeld Reports, (King's Bench, &c.).
N. R., New Reports, (Bosanquet & Puller).	Saund., Saunders Reports.
N. & M., Nevile & Manning Reports, (King's Bench).	Say., Sayer Reports, (King's Bench).
N. & P., Nevile & Perry Reports, (King's Bench, &c.).	Scott, Reports, (Com. Pleas &c.).
N. Y. Rev. St., New York Revised Statutes.	Selw. N. P., Selwyn's Nisi Prius.
O.	S. & R., Sergeant & Rawle Reports, (Pennsylvania).
Overton, Reports, (Tennessee).	Serg. on Cons., Sergeant on the Constitution.
P.	Shepl., Shepley Reports, (Maine).
Paine, Reports, (United States 2d Circuit).	Sid., Siderfin Reports.
Palm., Palmer Reports.	Smith Laws, (Pennsylvania).
Peake's N. P., Nisi Prius Cases.	South., Southard Reports, (New Jersey).
Peck, Reports, (Tennessee).	Spears, Reports, (S. Carolina).
Penn. Reps., Pennsylvania Reports.	Stam. } Stamfords Pleas of the Crown.
Penn. L. J., Pennsylvania Law Journal.	Staub. }
Peters R., Reports, (United States Supreme Court).	Stark. on Ev., Starkie on Evidence.
Peters St. at Large, United States Statutes.	Stark. Reps., Starkie Reports, (Nisi Prius).
" C. C. R., Reports, (United States 3d Circuit).	Stew., Stewart Reports, (Alabama).
P. Wms., Peere Williams' Reports.	Stew. & Port., Stewart & Porter Reports, (Alabama).
Per. & Dav., Perry & Davidson Reports, (King's Bench, &c.).	St. Tr., State Trials.
Ph. Ev., Phillips on Evidence.	Stanton, Reports, (Ohio).
Pick., Pickering Reports, (Mass.).	Steph. C. L., Stephen Criminal Law.
Pike, Reports, (Arkansas).	" Comms. " Commentaries.
Port., Porter Reports, (Alabama).	Sto. on Cons., Story on the Constitution.
	Sto. Reps., Story Reports, (United States 1st Circuit).
	Summ. MS., Hale's Summary, (Manuscript).
	Sumn., Sumner Reports, (United States 1st Circuit).

TABLE OF ABBREVIATIONS.

T.		Watts, Reports, (Pennsylvania).
Taunt., Taunton Reports, (Common Pleas, &c.)		W. & S., Watts & Sergeant Reports, (Pennsylvania).
T. R., Term Reports, (King's Bench).		Wend., Wendell Reports, (New York).
T. Raym., Sir Thomas Raymond Reports,		Went. Pl., Wentworth's Pleading.
Tr. Con. Rep., Constitutional Reports, (South Carolina).		W. Bl., William Blackstone Reports.
Tr. per pais, Trials per pais.		W. W. & D., Willmore, Wollaston, and Davison Reports, (King's Bench).
Tuck. Bl. Comms., Blackstone's Commentaries, (Tucker's edition).		Wils., Wilson Reports, (King's Bench, &c.)
Tyler, Reports, (Vermont).		Whart., Wharton Reports, (Pennsylvania).
Tyrw., Tyrwhitt Reports, (Exchequer).		Wh. Am. C. L., Wharton's American Criminal Law.
V.		Wheat., Wheaton Reports, (United States Supreme Court).
Ventr., Ventris Reports, (King's Bench).		Wheel. C. C., } Wheeler's Criminal
Verm., Vermont Reports.		Wh. Cr, C. } Cases.
Ves., Vesey Reports, (Chancery).		
Va. Cases, Virginia Cases.		Y.
W.		Yeates, Reports, (Pennsylvania).
Walker, Reports, (Mississippi).		Yerg., Yerger Reports, (Tennessee).
W. C. C. R. } Washington Reports, (Uni-		Younge & J., Younge & Jervis Reports, (Exchequer).
W. C. C. } ted States 3d Circuit).		

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HISTORIA PLACITORUM CORONÆ.

PART II.

CHAPTER I.

TOUCHING THE KING'S BENCH.

HAVING gone through the several kinds of capital offenses, I should now, according to my first proposed method, proceed to the enumerating and considering of offenses that are not capital; but I shall reserve that for the third part of this tractate.

1. Because the subject thereof is very large, numerous and various, and would exhaust too much of that time I have or can spend from other employments.

2. Because the method, order and rules of proceeding in capital causes, is different from any other course of proceeding in other criminal causes, and hath an appropriate method of proceeding by law consigned to it, and therefore they are fittest to be handled together.

And in this business I shall proceed in things as they arise in the order of proceeding in capital causes: *First*, I shall take a very brief account of the courts and jurisdictions [2] wherein they are to be decided; and this I shall not do at large, but so far forth only as it relates to proceedings in capital causes: and when I have briefly passed over that, then, *secondly*, I shall proceed with the whole tract of proceeding in criminal causes, from the first pursuit of the offender to his execution; as, namely, arrest, process, outlawry, arraignment, pleading, challenge, trial, clergy, sanctuary, judgment, reprieve, execution, &c. in the very same order as a course of proceeding in capital causes lies.

I. I begin with the jurisdictions, wherein causes of this nature are handled.

And altho the court of parliament is the highest court in this

kingdom, and a court wherein proceedings capital have been often heard and determined, yet I shall decline that business, 1. Because the course of proceeding in parliament is in a different method and order, than what is used in other ordinary courts. 2. Because the instances are many and various, and will take up a volume to give an account of them. 3. Because I have elsewhere gathered up some observations of that kind already.[1]

The highest ordinary court of justice next to the court of parliament, is the court of king's bench; I shall not at large pursue the jurisdiction of this court, for it hath been done to my hands amply already.(a)

But I shall only consider it with relation to capital proceedings, namely, treasons and felonies, and that very briefly; and therein, 1. Concerning the jurisdiction of the court in this particular. 2. Concerning the power of the judges of this court out of court, in relation to matters of crime or misdemeanor.

The court of king's bench consists of two kinds of jurisdictions, *viz.* the civil jurisdiction or the plea-side, and the criminal jurisdiction or the crown-side.

Till the time of Edward II. the matters of both kinds were entered promiscuously in the rolls; but then the
[3] rolls were discriminated, and those of the crown-side, entitled *Rez*, tho both were filed up together in the same bundles.

And thus it continued very long, but of later times the records of the pleas are bound up by themselves, and the records of the pleas of the crown bound up by themselves, and kept in the crown-office, under the immediate custody of the coroner of the king's bench, who is also the king's attorney in that court, and clerk of the crown.

In cases criminal, the court of king's bench have a different kind of proceeding touching offenses arising in the same county

(a) By lord Coke, 4 *Instit. cap.* 7.

[1] The only judicial power conferred on the Congress of the United States, is provided by the third section of Art. I, of the Constitution. "The Senate shall have the sole power to try all impeachments; when sitting for that purpose they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two thirds of the members present." And by the ninth section the passage of any bill of attainder is prohibited.

Similar judicial power is provided for this branch of their government by most of the State Constitutions.

The three constituent powers of government, judicial, legislative and executive, are in nearly all the Constitutions of the States expressly made separate.

where they sit, and offenses in other counties, and removed before them by *Certiorari*.

In the county where the court sits, there is every term a grand inquest, who are to present all matters criminal arising within that county, and then the same court proceeds upon indictment so taken; or if in the vacation-time there be any indictment of felony before the justices of the peace, *oyer* and *terminer*, or gaol-delivery there sitting, it may be removed by *Certiorari* into the king's bench, and they may proceed *de die in diem*, and there need not be fifteen days between the *Teste* and return of the *Venire facias*, because the offense ariseth in the same county.

But if an indictment of felony be removed out of another county than where the king's bench sits, and the prisoner comes in either *gratis* or by *Habeas Corpus*, or process, there must be fifteen days between the *Teste* and the return of the *Venire facias*. 9 Co. Rep. 118. b. lord Sanchar's case.

At common law, if a record of an indictment, or other thing come into the court before the filing thereof, the court may remand it; for 'till it be filed it is no record of the court; but if it be once filed, it is not to be remanded.

But if the issue be joined, the transcript may be sent down to be tried by *Nisi prius*; but the original record remains in the king's bench. 5 Martine, B. Coron. 231.

But by the statute of 6 H. 8. cap. 6. in cases of indictments of murder, or other felony removed into that court, the court may remand the indictments, and the bodies of the prisoners to the justices of the peace, gaol-delivery, and other justices, where the felony was committed, commanding [4] them to proceed thereupon, as if the prisoner or indictment had never been removed.

The court of king's bench is in the county where it sits, a court in *eyre* and more, 27 Assiz. 1. and also the sovereign court of gaol-delivery and *oyer* and *terminer*. 9 Co. Rep. 118. a. lord Sanchar's case.

And therefore when the court of king's bench comes into any county, there can be no session of the commission of gaol-delivery, or *oyer* and *terminer*, or peace during the term-time, while the court sits; it doth not determine the commission, but suspends their session during the term; for in the vacation-time, they may proceed again upon their former commission, and so it is not like a new commission, which after publication supercedes the former, *de quo infra*, lord Sanchar's case, *ubi supra*.

But if an indictment be found before commissioners of *oyer* and *terminer* in the vacation-time in the county where the king's bench sits, or in any other county in term or vacation,

there may issue a special commission to determine that indictment, with a writ to the former commissioners to deliver it to the new commissioners; and these special commissioners may sit in the term-time in the county where the king's bench sits; but then the king's bench must adjourn during that session of this special commission: ruled in Sir *Walter Rawleigh's* case, *M. 1 Jac. Co. P. C. cap. 2. p. 27. Dyer 286. b. Plowd. Com. 390. earl of Leicester's* case, wherein is the whole order of such commission. *4 Co. Inst. p. 73.*

The court of king's bench is the sovereign court of *oyer* and *terminer*, therefore tho some acts limit proceedings in some criminal causes to the justices of *oyer* and *terminer*, yet the king's bench may proceed upon them; but justices of peace cannot, as upon *5 Eliz. cap. 14.* for forgery, *8 H. 6. cap. 12.* stealing records, &c.

If a person attainted in the country be removed by *Habeas Corpus*, and the record removed also by *Certiorari*, this court may award execution. *M. 5 Car. 1. B. R. Coxe's* case. (b)

This court is also the sovereign coroner of *England*,
[5] and therefore may take appeals of death, &c. by bill.
4 Co. Inst. p. 73.

Where judgment of death is given in the king's bench, the execution is to be made by the marshal of the court; for the prisoner is supposed to be in *custodiā marescalli*; and the entry is always, *Et præceptum est marescallo, &c. quod faciat executionem periculo incumbente; quod vide Co. Entries* in title *Indictment; per totum*; but there may be a mandate to the sheriff of the county wherein execution is to be made, to be assisting; and thus it was done in *H. 24 Car. 2.* in the case of *Brown*, who had judgment of death in the king's bench for a felony committed in *Middlesex*, and executed by the marshal in *Surrey*, because the prison was there; but he might have done it in *Middlesex*, for he is a minister of the king's bench in each county; and so it might be, tho the felony had been done in any foreign county removed by *Certiorari*. (c)

By the statute of *33 H. 8. cap. 12.* felonies, &c. within the king's palace are made triable before the lord steward, and a special order of trial directed by that statute, namely, by the king's servants in his chequer-roll; yet for a felony within the king's palace, if the king's bench be sitting in the same county, the proceeding may be in the king's bench; for the statute of *33 H. 8.* being in the affirmative is not exclusive of the king's bench for felonies that were before that, *10 Co. Rep. 73. b.* But indeed where a felony is *de novo* created, and with it a new

(b) *Cro. Car. 176.*

(c) Thus it was done in *Althoe's* case, before mentioned, *Part I. p. 464.*

special form of proceeding, as by the statute of 3 H. 7. cap. 14. for conspiring the death of the king, &c. it is not triable in the king's bench, nor in any other form than is limited by that act. *M. 20 Jac. B. R. Castle's case. (d)*

Now concerning the justices of the king's bench.

They are in their persons conservators of the peace throughout *England* without any other commission; and any of them may issue out their warrants for apprehending of a malefactor, or for surety of the peace in any county of [6] *England*, namely; to apprehend and bring him before a justice of peace in the county where he is apprehended; and this warrant is directed under their hand and seal to sheriffs, constables, and other officers. Each judge of that court hath a tipstaff attending him, being a deputy to the marshal for the execution of his office in that special service; and the chief justice or any one of the other judges of that court, may by the custom of that court, *ore tenus*, command the tipstaff to apprehend any person for matters of misdemeanors relating to the court, or other misdemeanors, and bring him before him, and such arrest is justifiable without any other warrant, and without shewing the cause. *T. 11 Car. B. R. 2 Rol. Abr. p. 558. Throgmorton and Allen.*

The chief justice of the king's bench is not that *Justiciarius Angliæ* which was antiently in use; for that *Justiciarius Angliæ* had, in effect, all the jurisdiction both civil and criminal, that is in the king's bench, chancery, common pleas, and exchequer, and might and did sit in any of those courts as the chief judge of them, as appears by many evident instances.

But the chief justice of the king's bench hath in the court of king's bench, as one of the judges thereof, that part of the jurisdiction of the *Justiciarius Angliæ*, which concerns criminal causes, and the inspection and reformation of the judgments of other courts.

It is true he is frequently called chief justice of *England*, because he presides in that court where the *Justiciarius Angliæ* did most frequently and naturally sit as the king's deputy in administration of justice; but it is a misconception that therefore he is that *Magnus Justiciarius Angliæ*, which was in use before the time of *Henry III.*

He is created by writ, and always was; but the *Justiciarius Angliæ* by patent.

CHAPTER II.

CONCERNING THE COURTS BEFORE THE LORD HIGH STEWARD,
AND THE STEWARD OF HIS MAJESTY'S HOUSEHOLD.

Touching the former of these, it is instituted for the trial of peers of the realm: more cannot be said touching it, than is already said by my lord *Coke*, 4 *Inst. cap. 4. Co. P. C. cap. 2. p. 28. & sequentibus*, and because it doth not concern the usual and common proceedings against common persons, I shall dismiss it.

Touching the *second*, namely, the proceeding before the lord steward of the household, &c. for treasons, and murder, and manslaughter, and larciny done within the king's palace.

This court is established, and the method of proceeding therein punctually delivered by the statute of 33 *H. 8. cap. 12.* which will not need much explanation, only these things are considerable therein.

1. As to their power of hearing and determining treasons in that court, it seems to be wholly abrogated and repealed by the statute of 1 & 2 *P. & M. cap. 10.*

2. Whereas by that act, clergy is taken away in cases of manslaughter, felonious stealing of goods in the king's house of the value of twelve-pence; it seems to me clergy is restored in these cases by the act of 1 *E. 6. cap. 12.* tho the party be convicted according to the statute of 23 *H. 8.*

3. Whereas breaking of the king's house with intent to steal, is made felony by that statute without benefit of clergy, *that* breaking of the king's house is become no felony by the statute of 1 *E. 6. cap. 12.* and 1 *Mur. cap. 1.* tho he be arraigned before the steward of the *Marshalsea* according to that act.

4. The offense of felonious stealing of the king's
[8] goods of the value of twelve-pence, or breaking the king's house to steal the goods, is limited by that act to be tried before the steward of the *Marshalsea*, and others associated to him by the statute, but not before the lord steward, or treasurer, or comptroller of the household, as manslaughter or murder is directed to be tried or determined by that statute, nor by the king's servants.

5. It seems to me, that by the direction of that act the proceeding of the lord steward, or steward of the *Marshalsea*, is to be by a session within the king's house or palace where the felony is committed; and that statute limits the precinct of the

king's palace for that purpose, *viz.* within any edifices, places, courts, gardens, orchards, privy-walks, tilt-yards, wood-yards, tennis-plays, cock-fights, bowling alleys, near adjoining to any of the houses aforesaid, and being part of the same, or within 200 foot of the standard of any outward gate, or gates of any of the houses above rehearsed, commonly used for any passage out of, or from any of the houses above rehearsed,

And therefore if it is considerable, whether as to this purpose, *viz.* for trial of felonies within the king's palace, the extent of the king's palace of *Whitehall* limited, or rather extended by the act of 28 *H. 8. cap. 12.* be not restrained; for by that statute that new palace of *Whitehall*, the old palace of *Westminster*, *St. James's* park, and the street leading from *Charing-Cross* to the sanctuary-gate of *Westminster*, and all the houses and buildings on both sides of the street from the *Cross* to *Westminster-hall*, and between the water of *Thames* on the east and the park-wall on the west, and all the soil of the old palace are made parcel of the new palace.

Upon this doubt I did advise, that the lord steward upon a late occasion upon this act should not sit in *Westminster-hall*, but in *Whitehall*, according to the restriction of the statute of 33 *H. 8.* which was after the statute of 28 *H. 8.* and seems as to this purpose to restrain it; but this advice was not followed, for he sat in *Westminster-hall*.

Altho this act erects a new kind of jurisdiction, and that without any commission, yet it being an act in [9] the affirmative, it doth not exclude the jurisdiction of the king's bench, nor of commissioners of *oyer* and *terminer* to hear and determine these offenses, tho committed in the king's palace, especially that commission of *oyer* and *terminer*, which hath been usually granted to determine felonies and treasons within the verge, and particularly within the king's palaces; and therefore, tho this act of 33 *H. 8. cap. 12.* hath been long since made, and is a commission of itself to the lord steward, and in his absence to the treasurer and comptroller of the household, yet till this year I never knew nor heard of any session upon this statute: but the whole business of this nature was transacted in the king's bench, or by that antient and special commission of *oyer* and *terminer* for offenses within the verge, which commonly also had in it a commission of gaol-delivery, and was usually directed to the lord steward, lord chancellor, treasurer, justices, &c. whereof we may see the precedent, 4 *Co. Rep. Holcroft's case*, (a) the record whereof is at large, *New Entries, fol. 54.* (b) in an appeal, where it appears by the

(c) 4 *Co. 45. b.*

(b) This is *Co. Entries. 53. b.*

indictment, that the manslaughter was committed *infra hospitium domini regis de Hampton-Court*, yet the inquisition was found by the coroner, and the party tried before the commissioners of *oyer* and *terminer* and gaol-delivery for the verge, and not before the lord steward, by force of the act of 33 H. 8. and adjudged good.

And there it is, also resolved 4 Co. Rep. *Wrot's case* (c) and *Swift's case*, (d) that as the commissioners of gaol-delivery and *oyer* and *terminer* for the verge, have power to hear and determine felonies done in the king's palace, so the king's bench or general commissioners of *oyer* and *terminer* or gaol-delivery, and justices of peace for the county, have power to hear and determine any felony committed within the verge, so that they have all a concurrent jurisdiction, namely, the lord [10] steward, commissioners of *oyer* and *terminer* and gaol-delivery for the verge, commissioners of *oyer* and *terminer*, gaol-delivery and peace for the county at large, tho the offense were committed in the king's palace.

CHAPTER III.

TOUCHING SPECIAL COMMISSIONS OF OYER AND TERMINER, AND THEIR KINDS AND POWER.

Commissions of *oyer* and *terminer* are of two kinds, special, or general for a whole county.

Special commissions are of several kinds. 1. Commissions of *oyer* and *terminer* for the verge. 2. For crimes done upon the sea by the statute of 28 H. 8. cap. 15. 3. Commissions for particular places, that are not counties. 4. Commissions to hear and determine particular facts. 5. Commissions to hear or enquire, and not determine. 6. Commissions to determine, and not enquire.

I. Touching commissions of *oyer* and *terminer* for the verge, *viz.* within twelve miles of the king's court somewhat hath been before said; I shall add farther,

1. That by virtue of that commission they have power to inquire and determine felonies and murders done within the king's house. 2. And these they are to proceed upon, not according to the direction given to the lord steward, *viz.* by the king's yeomen officers, tho there is a grand inquest of them also; but by the good men of the county, wherein the offense was com-

(c) 4 Co. 46. b.

(d) *Ibid.*

mitted, whether it be committed in the palace, or elsewhere within the verge. 3. Tho the commission extend into several counties; namely, any that are within twelve miles of the tenet of the king's hall, yet they are to hold their sessions in any county within the verge, and a precept issues to [11] the knight marshal to impanel a grand inquest out of every county within the verge, of the men of those counties to appear where they sit, and there to inquire and try the offenses committed in that county. 4. That they can only proceed upon indictments taken before themselves, and therefore cannot proceed upon a coroner's inquest; and to remedy that inconvenience, they have always, or at least should have in the same commission, a commission of gaol-delivery; and by virtue of that part of their commission they may proceed upon the coroner's inquest; *vide Co. Entries* 54. in *Holcroft's* case. 5. It seems to me, that if a special commission for the verge issue, which possibly may extend to *Middlesex, Surry, and Hertford*, if a general commission of *oyer and terminer* in the county of *Middlesex* issue after that, with notice to the commissioners for the verge, it determines their commission of *oyer and terminer* as to *Middlesex*, but not as to the other counties; and so for a general commission of gaol-delivery; for this is not aided by the statute of 2 & 3 P. & M. cap. 18. for that preserves only the commissions granted to cities and boroughs. 6. And *converso*, if a general commission of *oyer and terminer*, or gaol delivery for the county issue, and then afterwards a like commission issue for the verge, notice thereof, or session by the commission for the verge determines the general commission as to so much of the county, as is within the precinct of the verge; see the whole procedure, *Coke's Entries* p. 54, 55.

Tho commissions for the verge have often issued, I do not remember any session since about 8 Car. 1. for the businesses that fall within their cognizance, are as well and effectually dispatched in the king's bench, or by general commission of gaol-delivery, and *oyer and terminer* in the several counties at large; *quod vide* 10 Co. Rep. 73. b. the case of the *Marshalsea*, 4 Co. Rep. *Wroth* and *Wigg's* case, and *Holcroft's* case there cited; only indeed the coroner of the verge is a necessary officer; *de quo postea*.

But the original power of the steward and marshal touching felonies within the verge, tho I know nothing that hath expresly taken it away, yet by *disuser* is in effect [12] vanished, and that jurisdiction is wholly exercised by this special commission of *oyer and terminer*, or in the king's bench, or general justices of *oyer and terminer* or gaol-delivery at large, who have jurisdiction of such felonies, tho committed

within the verge; *vide Coke super statut. Articuli super Cartas, cap. 3 & 10 Co. Rep. le case de Marshalsea.*

II. The second kind of special commission of *oyer and terminer*, is, that which is founded upon the statute of 28 H. 8. cap. 15. for offenses upon the sea, or in great rivers below the bridges.

I shall not enter into a large description of the admiral's jurisdiction, but only set down briefly some observations in relation to capital offenses, because I have elsewhere more at large examined it.

As to criminal causes, that are capital, as treasons, felonies, &c. there is a threefold jurisdiction relative to the admiral and court of admiralty.

1. Its primitive and original jurisdiction, and this was of treasons, felonies, or piracies done upon the high sea, which was sometimes held before the admiral, or his lieutenant as such without relation to any other commission; and sometimes by special commission under the great seal, even whether there was an admiral in being or not.

The rule of their proceeding was *secundum legem maritimam*, their trial by proofs; and therefore, though they did proceed oftentimes to sentence of death, and executed it, yet in as much as the proceeding was according to the course of the civil and marine laws, and not according to the common law, it worked no corruption of blood.

Tho their jurisdiction was of things done upon the high sea, yet they might hold their session in any place upon land.

And altho at this day it is commonly received, that the courts of the common law have no jurisdiction of felonies committed upon the high sea, yet most certainly the king's bench had usually cognizance of felonies and treasons done upon the narrow seas, tho out of the bodies of counties, and it was [13] presented and tried by men of the adjacent counties.

T. 18 E. 2. Rot. 18. Rex. Glouc. & Somers'. M. 26 E. 3. Rot. 51. Norfolk. T. 34 E. 1. ceram. Rege. Rot. 94. Norfolk. T. 8 E. 2. ibidem Rot. 111. M. 18 E. 2. Rot. 15. M. 19 E. 2. Rot. 17. Rex. T. 25 E. 3. Rot. 22. Linc. M. 27 E. 3. Rot. 29. Rex. (a) 8 E. 2. Coron. 399. 40 Assiz. 25. So that the

(a) The cases referred to here by lord Hale, as proofs of the ancient jurisdiction of the king's bench in offenses done upon the seas, were as follow:

Trin. 18 E. 2. Rot. 18 Rex. Several persons of Bristol had been indicted before the admiral of the king's fleet, "per inquisitionem de mandato regis inde factam, per sacramentum marinatorum, quod vi & armis, & felonice depredati fuerunt navem de *Placentia* in alto mari, inter *La Ras* sancti Martini, & *Odyerna*, de bonis & mercimoniis, &c." The indictment was returned into chancery, and a writ issued to the sheriff of Gloucestershire to attach the said persons, and bring them *coram seipso* and the mayor of Bristol & *auditiâ querelâ*, to do justice to the

court of king's bench had certainly a concurrent jurisdiction with the admiralty, in cases of felonies done upon the narrow seas or coast, though it were high seas, because within the king's realm of *England*.

merchants, "super recuperatione bonorum secundum legem mercatoriam, & nihilominus malefactorēs, prædictos in prisonā salvo custodiri facere," till they should be delivered by course of law. The sheriff neglecting to execute effectually what was enjoined him by the said writ, a second writ was directed to the mayor of *Bristol*, "Quod præmissa omnia & singula diligenter & efficaciter faceret, &c." Afterwards *processus totius negotii prædicti* was brought *coram rege*, by which it appears, that one *Clement Turtle* had been impleaded before the said mayor, by the master of the ship, &c. "Quod habuit ad partem suam de bonis deprædatis ad valentiam 25. injustis, &c. Et hoc parati sunt verificare per mercatores & marinariorum villas prædictas." *Turtle* pleaded not guilty, and was acquitted by a jury of merchants and mariners; the which jury *ex officio* again indicted the same persons, who had before been indicted "coram admirallique flote, quod navem prædictam de bonis, &c. felonice deprædarent," and thereupon a *copias* issued to the sheriff to bring them *coram Rege ubicunque*, &c. to answer for the said crime, &c. Mich. 26 E. 3, Rot. 51. in *dorso. coram Rege. Norfolk*. *John Selondere* impleaded several persons *de placito transgressionis per billam*, for entering his ship *super costerum maris de North'enn*, beating and wounding him, and plundering the ship, *quam in mari prædicta reliquerunt in desperationem, per quod navis prædicta perivit omnino*; and recover'd 360 marks against them, for the damages sustained thereby.

Trin. 34 E. 1. Rot. 34. *coram Rege. Norfolk*. Several merchants of *Lincoln* put on board a ship wool and other commodities for *Brabant*, to the value of 896l. 10s. The ship in its passage was entered in a hostile manner in the port of *Gerflet*, in *Zealand*, and plundered by the subjects of the earl of *Hainault*: satisfaction had been demanded of the earl for this depredation in vain; and thereupon, at the suit of the said merchants of *Lincoln*, a writ was directed to the bailiffs of *Lynn* to seize omnia bona, &c. of the merchants of *Hainault*, and keep them till the *Lincoln* merchants had received satisfaction, or till farther order should be taken therein. To this writ the bailiffs returned, that the *Hainault* merchants had *tulla bona infra balliviam suam*: upon this a *Lincoln* merchant came into chancery, and alleged, that seizure had been made of goods to the value of 31l. 17s. by the said bailiffs, which they had redelivered to the *Hainault* merchants without warrant, and thereupon a second writ issued to the said bailiffs, ordering them to pay *insolent* the said 31l. 17s. to the *Lincoln* merchants in part of their loss, or else to appear *coram Rege* in octabis Trin. *ubicunque*, & interim to seize omnia bona, &c. of the *Hainault* merchants, as before. It appears afterwards, Mich. 15 E. 2. Rot. 142. *coram Rege*, that the said earl of *Hainault* in the parliament, anno 4 E. 2. acknowledged himself *per nuncios suos*, to be indebted to the *Lincoln* merchants in the sum of 954l. on account of this depredation; 70l. of which was allotted to *Walter le Ken* one of them, in satisfaction for his loss; and at his suit a writ was directed to the sheriff, *quod levare faceret 70 libras de bonis, &c. of the Hainault merchants*, arrested by consent of the said earl of *Hainault* at *Yarmouth*, and bring the money into chancery, *ad satisfaciendum prædicto Walteri le Ken*: by virtue of which several sums of money were paid to him, in *parte debiti prædicti*.

Trin. 8 E. 2. 111. in *dorso. coram Rege. Kane*. A mandate issues to the constable of *Dover*, and warden of the cinque-ports, to take into custody several persons, for entering a ship from *Flanders vi & armis*, laden with cloth and other goods, belonging to certain merchants of *Ipses*, "quos pannos abduxerunt, & mercatores ligaverunt, & imprisonaverunt, &c. ita quod habeat eos coram rege ad respondendum præfatis mercatoribus super præmissis, &c."

Mich. 18 E. 2. Rot. 25. in *dorso. coram Rege. Lincoln*. The mayor and commonalty of *Grymesby* impleaded several persons "pro circumdandis & discircumdandis

And as it was thus in the king's bench, so in this case special commissions to hear and determine offenses upon the coast, *secundum legem & consuetudinem regni Angliæ*, did often issue.

But indeed a general commission of *oyer and terminer* of felonies *infra comitatem*, &c. did not extend to misdemeanors upon the sea-coast, unless in those creeks and rivers and arms of the sea, that were within the body of the county.

So that even in these cases of felonies or treasons committed

navibus apud *Villam de Cle*, infra quatuor leucas villæ de *Grymesby*," whereby the said corporation was endamaged, and lost the custom due to them on all goods and merchandise, "carcata, seu discarcata, infra quinque leucas villæ de *Grymesby*, in auxilium firmæ suæ de regē," and a precept issues to the sheriff to attach, and bring them *coram Rege*, to answer for the said offenses.

Mich. 12 E. 2. Rot. 17. Rex. The king signifies by writ to the justices of his bench, that precepts had issued to several sheriffs to attach certain persons, "quorum nomina sub pede sigilli sui eis misit, qui durante sufficientia inter subditos regis Angliæ, & comitis Flandriæ, quandam navem de Flandriâ diversis bonis & mercimoniis, ad valorem 2000 marcarum, carcatam, infra aquam de Tyne prope Tynemuth, vi armata ceperunt, & bona & mercimonia prædicta, &c. inter se partiti fuerunt." In consequence of which process it appears, *Rot. 18. ibidem*, that several persons were brought *coram Rege* by the sheriff of Northumberland; where they were impleaded by the king's attorney for having part of the said goods, "Et dicunt quod nihil ceperunt, &c. Et de hoc ponunt se super patriam." Upon which the king's attorney joined issue with them, and the court bailed them *de die in diem, quosque, &c.*

Trin. 25 E. 3. Rot. 22. Lincoln. Rex. William Coupeman and Robert Fitz William had been indicted, "coram vicecomite & custodibus pacis in comitatu Line." Quod felonice deprædaverunt *Johannem Gryme de Kirkeby*, in mari apud *Freston-bord*; et quod de *Freston-bord* porrexerunt supra marem versus partes boreales, & in alto mari deprædaverunt, & demerserunt octo batellas piscatorum, & sex homines in prædictis batellis existentes, felonice interfecerunt." The indictments were sent into the king's bench, and thereupon the said William and Robert were brought "coram Rege apud Aylesbury, ad respondendum, &c." But it appearing that both of them had been tried upon the said indictments before the justices of gaol-delivery at Lincoln, and acquitted; "Consideratum est quod iidem Robertus et Willielmus eant inde quieti."

Mich. 27 E. 3. Rot. 29. Rex. London. Henry Pickard, coroner of London, delivered with his own hand *coram Rege*, quosdam cognitiones *coram ipso factas* in the Tower of London by several persons, who confessed that they had feloniously entered a ship near *Feversham*, thrown the men on board it into the sea, plundered it, and then sunk it; that they afterwards went from *Waseryngg usque apud fothingg de Tenet*, and feloniously entered another ship there, stripped it of what goods were on board, killed all that were in it except two women, and flung them into the sea; "Et quod fornicaverunt cum duabus mulieribus prædictis, quas quidem post tres dies elapso felonice interfecerunt." Upon this four of the said criminals were immediately brought *coram Rege*, and being asked severally, why judgment should not pass upon them, "juxta cognitiones suas prædictas, nihil dicunt. Ideo consideratum est, quod trahantur, & suspendantur," As to two others, "quia curia nondum advisatur de procedendo ad iudicium super eis," they were committed to the marshal, and afterwards removed to *Newgate* by the king's writ, being appealed, "coram Vic' & Coron' Civitatis London, by Allen de Crendon, de morte Thomæ de Crendon fratris sui, apud le forlonges in mari juxta insulam de Teneto in com' Kent' felonice interfecit, super appello prædicto, secundum legem & consuetudinem regni Angliæ, responduri."

upon the sea-coast in the narrow seas, the king's bench, or special commissions of *oyer and terminer secundum legem & consuetudinem regni Angliæ*, had a concurrent jurisdiction with the court of admiralty.

But this jurisdiction of the common law courts in cases of felonies and treasons, and other crimes committed upon the sea-coast, was interrupted by a special order of the king and his council, *Claus. 35 E. 3. m. 28. dorso*, and by a *Supersedeas* that issued shortly after; and since 38 E. 3. I have not observed, that the king's bench, or courts of the common law have proceeded criminally in cases of crimes of this nature committed upon the high sea.

But if any felony or treason was committed within any creek or arm of the sea, which was within the body of a county, the courts of the common law only had jurisdiction in such cases, and the admiral had no jurisdiction at the common law in such cases.

And thus far touching the jurisdiction of the ad- [16]
miral or maritime court at common law.

2. But by the statute of 15 R. 2. cap. 3. of the death of a man, or maihem in great ships hovering in the main stream of great rivers *below the bridges* (for so is the record, and not *below the points*) nigh to the sea, the admiral shall have jurisdiction.

This first gave the admiral jurisdiction in any river or creek within the body of the county, which only extends to the death of a man and maihem.

But yet observe, this is not exclusive of the courts of common law; and therefore the king's bench, or the general commission of *oyer and terminer* to hear and determine felonies, &c. in the county, have herein a concurrent jurisdiction with the court of admiralty.

And as well the coroner of the county, as of the admiral, may take inquisitions upon such deaths happening in great rivers, namely, arms of the sea, that flow and reflow beneath the first bridges. 8 E. 2. *Coron.* 399.

Only these things are observable. 1. That it extends only to rivers, that are arms of the sea, namely, that flow and reflow, and bear great ships. 2. It seems to extend only to such deaths as happen in those great ships, not in small vessels. 3. That by that statute this jurisdiction is annexed to the court of admiralty, and consequently they may proceed therein by proofs, according to the course of the marine law, and hold their session where they please, tho they did often, even before the statute of 28 H. 8. proceed by commission under the great seal, and by inquisition.

3. By the statute of 28 *H. 8. cap. 15.* the course of proceeding in criminal causes is settled in a different method, in which these things are observable, *viz.* 1. The things to which it extends, *treasons, felonies, robberies, murders, and confederacies.* 2. Where committed, *viz. in and upon the sea, or in any other haven, creek, river, or place, where the admiral hath, or pretends to have power, authority, or jurisdiction:*

This seems to me to extend to great rivers, where the [17] sea flows and reflows below the first bridges, and also in creeks of the sea at full water, where the sea flows and reflows, and upon high water upon the shore, tho these possibly be within the body of the county, for there, at least by the statute of 15 *R. 2.* they have a jurisdiction, and thus accordingly it hath been constantly used in all times, even when judges of the common law have been named and sat in their commission; but we are not to extend the words (*pretend to have*) to such a pretense as is without any right at all, and therefore, altho the admiral pretends to have jurisdiction upon the shore, when the water is reflowed, yet he hath no cognizance of a felony committed there; and therefore it was resolved, 25 *Eliz. Lacie's case*; That if a man be stricken upon the high sea, and die upon the shore, after the reflux of the water, the admiral by virtue of this commission hath no cognizance of that felony. 2 *Co. Rep. f. 93. a. Bingham's case*, 5 *Co. Rep. f. 107. a. Constable's case*, *Co. P. C. cap. 7. p. 48.* but of this hereafter.[1] 3. The commission must be directed to the lord admiral or his lieutenant, and three or four others. 4. The proceeding and trial is to be according to the course of the common law, as if the offense were committed at land within the realm. 5. Their session is to be in such places and counties as shall be appointed by the king's commission; no challenge for default of hundreders. 6. The offender excluded from clergy, but *quære*, whether the statute of 1 *E. 6. cap. 12.*

[1] In a case at the admiralty sessions of a murder committed in a ship in a part of Milford Haven never known to be dry except at the very lowest tide, and which was about three miles over, about seven or eight miles from the mouth of the river or open sea and about sixteen miles below any bridges over the river, a question was made whether the place where the murder was committed was to be considered as within the limits to which commissions granted under *stat. 28 Hen. VIII. ch. 15* do by law extend. Upon reference to the judges they were unanimously of opinion that the trial was properly had; and it is said, that during the discussion of the point Lord Hale's construction of this act was much preferred to the doctrine of Lord Coke, 3 *Inst.* 111. 4 *Inst.* 134; and that most, of the judges seemed to think that the common law has a concurrent jurisdiction with the admiralty in this haven and in all other havens, creeks and rivers in the realm of this nature, although in the body of a county. *Bruce's case*, 2 *Leach, C. C.* 1093; 1 *East, P. C.* 368; *Russ. & R. C. C.* 243, *S. G.*

does not restore it even in this case, as some of the judges in *Alexander Poulter's case*(d) held? But my lord *Coke*, *P. C. cap. 49.* saith piracy is excluded from clergy: It seems to me, that as to all offenses but treason, and piracy, and murder, the offender is to have his clergy by the statute of 1 *E. 6. cap. 12.* 7. The hearing and determining being directed to be according to the course of the common law, if the prisoner stands mute, he shall have *peine fort & dure.* *Co. P. C. cap. 49. p. 114.* 8. This statute is not repealed by the statute of 35 *H. 8. cap. 2.* nor by the statute of 1 & 2 *P. & M. cap. 10.* 9. An accessory cannot be punished by this act, but may be punished by the admiral according to the [18] marine or civil law. 10. An attainder upon this act worketh no corruption of blood.

Thus far in general of this commission; only I shall add,

1. That touching piracy upon the sea at this day, it is commonly taken the common law hath no concurrent jurisdiction; and therefore if an accessory be at land to a piracy at sea, the commissioners upon this statute cannot try it because done at not made felony, whereof the common law can take notice; land, and besides the statute extends only to principals. *Co. P. C. p. 112.* nor can the common law try it, because piracy is Again, if *A.* commit a robbery at sea, and brings the goods to land within the body of a county, this is not felony triable by the common law, because the common law takes no notice of the original fact. *Co. P. C. p. 113. Butler's case* cited 28 *Eliz.*

2. That touching treason or felony committed upon the high sea, as the law now stands, it is not determinable by the common law courts, but only upon this statute.

3. But if a felony be committed in a navigable arm of the sea, the common law hath a concurrent jurisdiction:

But note well, that besides this commission founded upon the statute of 28 *H. 8.* which extendeth only to treason, murder, robbery, and confederacies,[2] there is, and for above these

(d) 11 *Co. 31. b.*

[2] The jurisdiction for the trial of offences under the statute of 28 *Hen. VIII. ch. 15.* only extended to the offences therein named, viz. treasons, felonies, robberies, murders and confederacies and did not give conuance of any felony not a felony at land nor to any new created felony, created by statute since the passage of that act. 4 *Blacks. Comms.* 269. To remedy this the stat 39 *Geo. III. ch. 37.* enacts "that all offences committed on the high seas out of the body of any county shall be offences of the same nature and liable to the same punishments as if they had been committed on shore and shall be inquired of, heard, tried and adjudged as offences under the stat. 28 *Hen. VIII. ch. 15.*"

All offences committed on the seas are tried before commissioners nominated

hundred years last past there hath been in the same commission, a common law commission of *oyer and terminer*, and also a commission of the peace and gaol-delivery for all offenses against any penal laws *super mare, vel infra fluxum maris ad plenitudinem maris*; and also of all treasons, murders, felonies, &c. *super mari vel aliquo rivo, portu, aqua dulci, creca, seu infra fluxum maris ad plenitudinem maris, a quibuscunque primis pontibus versus mare & super littus maris, &c. secundum stylum & consuetudinem regni Angliæ & curiæ admiralitatis*, and limits the county of their session and inquiry. This may be seen at large in 25 *Eliz.* in *Lacie's case*.(e)

But then for so much as lies within the body of any county, their commission is a commission of the peace, gaol-
 [19] delivery, and *oyer and terminer*, and consequently plain commissions at common law, and their sessions ought to be within the county where the fact inquirable is to be inquired, because it is but a special commission at common law.

The case of *Lacy* was thus:

Die Lunæ in quartâ septimand. Quadragesimæ 23 Eliz. at the castle of *York*, there was a general session by commission of gaol-delivery and *oyer and terminer* for the county of *York* directed to baron *Chute* and others.

At this session *Ambrose Lacy* and others were indicted of the murder of *Richard Peacock*, supposing the stroke given 5 *August 22. Eliz.* and the death 6 *August 22. Eliz.* both supposed to be at *Scarborough*, in *commitatû Eboracensi*.

This indictment was delivered into the king's bench in *mensæ Martii* following, and *Lacy* appearing in the king's bench was thereupon arraigned: he pleaded that the place, where *Richard* was stricken and after died, was called *Scarborough-sands*, and that it is and at the time of the stroke & continuè postea fuit locus *infra fluxum & refluxum maris infra plenitudinem ejus in Scarborough prædict, & parcella portûs de Scarborough*; and that within that place the admirals 28 *H. 8.* & semper tam antea, quam postea habebant & prætendebant habere jurisdictionem; then shews the letters patents of *oyer and terminer* to baron *Chute* and others within the counties of

(e) 1 *Leon.* 270.

by the Lord Chancellor, the indictment being first found by a grand jury of twelve men and afterwards tried by another jury, as at common law; the course of proceedings being according to the law of the land. Among the commissioners are always the deputy of the admiral or the judge of the admiralty and two or more of the common law judges. 4 *Blacks.* 269.

The practices and proceedings in the Court of Admiralty are now chiefly regulated by *stats. 3 & 4 Vict. chap. 65* and 66.

York, &c. according to the usual form, which was delivered to baron *Chute* and the rest 18 Feb. 23 *Eliz.*

That afterwards 25 Feb. 23 *Eliz.* the commission upon the statute of 28 *H. 8.* including also the commission of gaol-delivery, *oyer* and *terminer*, and the peace, *ut supra*, issued to the earl of *Lincoln*, lord admiral, and divers others, &c. to inquire, hear and determine, and deliver the gaol of all murders tam super mare vel aliquo rivo, portu, aqua dulci, creca, seu loco quocunque infra fluxum maris ad plenitudinem à quibuscunque primis pontibus versus mare, quam super littus maris & alibi ubicunque infra jurisdictionem nostram maritimam & jurisdictionem curiæ admiralitatis, &c.

That this commission was delivered to the lord admiral, &c. 26 Feb. 13 *Eliz.*

That afterward and before the inquisition before baron *Chute*, &c. the lord admiral gave notice to the [20] said baron *Chute* of that commission.

And that after that notice, viz. 6 *Martii* in quarta septimana Quadragesimæ this inquisition was taken before baron *Chute*, &c. upon which he is now arraigned.

Then he shews, that 2 *Martii* 23 *Eliz.* the lord admiral, &c. issued their precept to the sheriff of *York* by virtue of the second commission, and thereupon an indictment was found that *Am-brose Lacey* killed *Peacock* *se defendendo*, and set forth the special manner, and avers that it is the same death, and that the locus, in quo the stroke was given, was called *Scarboroughsands* *infra fluxum & refluxum maris ad plenitudinem ejus*, & *parcella portus de Scarborough*; and that the admiral 28 *H. 8.* *ac continuè postea & antea habebat vel pretendebat habere jurisdictionem*, & sic dicit quod inquisitio coram baron *Chute* fuit void.

The king's attorney demurred, and Mich. 26 *Eliz.* judgment was given, *quod eat sine die.*

Which judgment doth not at all enforce, that the admiral had jurisdiction by the statute of 28 *H. 8.* in this case, where a murder was committed in a port, or a stroke given at high sea, and a death upon the sands; but only this second commission extending so large, namely upon the sea-shore and in the ports, did for so much repeal the former commission in the county at large; for that second commission was in part a common law commission, as hath been said.

And therefore I take it to be true, that if a man be stricken upon the shore at full sea, and die upon the shore at low water, this is not within the statute of 28 *H. 8.* nor within a general commission of *oyer* and *terminer* in the county, but yet I do

not think it is to be determined by the constable and marshal, as my lord *Coke*, *ubi supra*, intimates, but it may be determined in the king's bench sitting in the county, where the party died, or by a special commission of *oyer* and *terminer*.

III. The third kind of special commission is, that [21] which is limited to particular places, that are not counties: Such are the commissions of *oyer* and *terminer*, and likewise of gaol-delivery, or the peace limited and granted within certain corporations or boroughs; nay, I think it may be granted to particular rivers, tho they extend to several counties, but then every county must have a particular session of its own, for so much of the river as is within the precinct of that county.

If the king issues a commission of *oyer* and *terminer* or gaol-delivery to any city or town not being a county, if a general commission afterwards issues for the whole county, this second commission after notice or a session by virtue thereof determined and superseded the special commission; but this is remedied by the statute of 2 & 3 P. & M. cap. 18. whereby it is enacted, that such a special commission shall not be determined by the granting or sitting of a general commission in the county at large.

IV. Special commissions of *oyer* and *terminer* may be made for some special offenses: And such were antiently very usual, as touching labourers, weights and measures, and the like; for as a general commission may be to hear and determine all offenses, so it may be for particular offenses.

V. Special commissions to hear and not to determine offenses: Tho by force of some particular statutes such commissions of inquiry may issue, as upon the statute of 23 H. 6. cap. 10. of sheriffs and some others, yet regularly as to matters of misdemeanor, especially such as are capital, as felony or treason, no such commission of inquiry only is warrantable: *Vide T. 5 Jac. 12 Co. Rep. p. 31.*

VI. A commission to determine and not to inquire: Regularly in all commissions *ad audiendum & terminandum* the commissioners ought to proceed upon indictments before themselves; *de quo infra.*

But it hath been not unusual in cases, especially of treason, that where an indictment is taken before justices of *oyer* and *terminer* for an offense committed in the proper county, a

special commission may issue to determine that indictment in another county, but then upon *not guilty* pleaded the same must be tried before these second commissioners, by men of the county where the offense was

committed: *Vide Co. P. C. p. 27. Plowd. Com. 390. Casus com' Leicester and Somervill's case, &c. (f)*

I shall not instance farther touching special commissions: Some acts of parliament have directed commissions of this nature, as upon the statute for treasons and felonies committed in another county by the statute of 33 *H. 8. cap. 23.* (which, tho repealed as to treasons by 1 & 2 *P. & M. cap. 10.* yet stands as to murders, and *vide Crompt. fol. 22. a. Grevill* examind before the council was arraigned for murder in another county upon this statute,*) and standing mute was pressed.) and upon the statute of 35 *H. 8. cap. 2.* of foreign treasons.

Et hæc dicta sunt de special commissions d'oyer and terminer.[3]

(f) 1 *And. 107.*

(*) This case was *M. 31. Elis.*

[3] *The Constitution of the United States, Art. III. Sect. 2,* provides, that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction.

The Judiciary Act of Sept. 24, 1789, provides:

Sect. 9. The District Courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.

Sect. 11. The Circuit Courts shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct; and concurrent jurisdiction with the District Courts of the crimes and offences cognizable therein.

It has been supposed that the Federal Courts might, without any statute and under this general delegation of admiralty powers, have exercised criminal jurisdiction over maritime crimes and offences. *U. S. v. Coolidge, 1 Gall. 488;* and see *Dr. Lovie v. Belt, 2 Gall.*

In *Corsfield v. Coryell, 2 W. C. C. Reps. 282,* it was contended in argument that the offence of taking oysters out of season, and with destructive instruments, having been anciently considered as within the cognizance of the admiralty and maritime jurisdiction, it was repugnant to the provision of the Constitution of the United States that a State should enact penal laws for the punishment of such offences. But Judge Washington held, that however it might be at common law, the United States' Courts, without further legislation by Congress, had no cognizance of such offences; he says: "As to the ancient criminal jurisdiction of the admiralty in cases of misdemeanors generally, committed on the sea, or on waters out of the body of any county; we have very respectable authority for believing that it was not exercised, even if it existed, at the period when the Constitution of the United States was formed, and if so, it would seem to follow that to the exercise of jurisdiction over such offences, some act of the national Legislature to punish them as offences against the United States is necessary. We find from the opinions of learned and eminent counsel who were consulted on the subject, that misdemeanors committed upon the sea, had never been construed as being embraced by the statute 26 *Hen. VIII. c. 15,* and that the criminal jurisdiction of the admiralty, except

as exercised under that statute, had become obsolete, so that without an act of Parliament, they could not be prosecuted at all." 2 *Bra. C. & A. Law. Appendix*, 519.

It seems now to be settled, that the Federal Courts, as courts of admiralty, are to exercise such criminal jurisdiction as is conferred upon them expressly by acts of Congress, and that they are not to exercise any other. The United States' Courts have no unwritten criminal code to which resort can be had as a source of jurisdiction. They have none but what is conferred by Congress, and this principle extends as well to admiralty and maritime as to common law offences. 4 *Kent's Comm.* 364.

The Act of Congress of April 30, 1790, chap. 9, provides:

Sect. 8. If any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular State, murder or robbery, or any other offence, which, if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandize to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought.

Sect. 9. If any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under colour of any commission from any foreign prince, or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged, and taken to be a pirate, felon, and robber, and on being thereof convicted, shall suffer death. (*U. S. v. Palmer*, 3 *Wheat.* 610; *U. S. v. Klintock*, 5 *Wheat.* 144; *U. S. v. Smith*, 5 *Wheat.* 153; *U. S. v. Furlong*, 5 *Wheat.* 184; *U. S. v. Holmes*, 5 *Wheat.* 412; 1 *Gall.* 247; *U. S. v. Ross*, 1 *Gall.* 624; *U. S. v. Keple*, 1 *Bald.* 15; *U. S. v. Gilbert*, 2 *Summ.* 19; *U. S. v. Wittberger*, 5 *Wheat.* 76.)

Sect. 10. Every person who shall, either upon the land or the sea, knowingly and wittingly aid and assist, procure, command, counsel, or advise any person or persons, to do or commit any murder or robbery, or other piracy aforesaid, upon the sea, which shall affect the life of such person, and such person or persons shall thereupon do or commit any such piracy or robbery, then all and every such person so as aforesaid aiding, assisting, procuring, commanding, counselling, or advising the same, either upon the land or the sea, shall be, and they are hereby declared, deemed, and adjudged to be accessory to such piracies before the fact, and every such person being thereof convicted, shall suffer death.

Sect. 11. After any murder, felony, robbery, or other piracy whatsoever aforesaid, is, or shall be committed by any pirate or robber, every person who knowing that such pirate or robber has done or committed any such piracy or robbery, shall, on the land or at sea, receive, entertain, or conceal any such pirate or robber, or receive or take into his custody any ship, vessel, goods, or chattels which have been by any such pirate or robber piratically and feloniously taken, shall be, and are hereby declared, deemed, and adjudged to be accessory to such piracy and robbery after the fact, and on conviction thereof shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars. (*U. S. v. Howard*, 3 *W. C. C.* 340.)

Sect. 12. If any seaman or other person shall commit manslaughter upon the high seas, or confederate, or attempt, or endeavour to corrupt any commander, master, officer, or mariner to yield up or to run away with any ship or vessel, or with any goods, wares, or merchandize, or to turn pirate, or to go over to or confederate with pirates, or in any wise trade with any pirate knowing him to be such, or

shall furnish such pirate with any ammunition, stores, or provisions of any kind, or shall fit out any vessel knowingly and with a design to trade with or supply or correspond with any pirate or robber upon the seas; or if any person or persons shall any ways consult, combine, confederate, or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; or if any seaman shall confine the master of any ship or other vessel, or endeavour to make a revolt in such ship; such person or persons so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars. (*U. S. v. Kelley*, 11 *Wheat.* 417; *U. S. v. Hemmer*, 4 *Mason*, 105; *U. S. v. Keefe*, 3 *Mason*, 475; 5 *Mason*, 460; *U. S. v. Smith*, 1 *Mason*, 147; *U. S. v. Hamilton*, 1 *Mason*, 443; *U. S. v. Kelley*, 4 *W. C. C.* 538.)

Sect. 13. If any person or persons within any of the places upon the land under the sole and exclusive jurisdiction of the United States, or upon the high seas, in any vessel belonging to the United States, or to any citizen or citizens thereof, on purpose and of malice aforethought, shall unlawfully cut off the ear or ears, or cut out or disable the tongue, put out an eye, slit the nose, cut off the nose or a lip, or cut off or disable any limb or member of any person, with intention in so doing to maim or disfigure such person in any the manners before-mentioned, then and in every such case the person, or persons so offending, their counsellors, aiders and abettors, (knowing of and privy to the offence aforesaid,) shall, on conviction, be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars.

Sect. 16. If any person within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away, with an intent to steal or purloin the personal goods of another; or if any person or persons having at any time hereafter the charge or custody of any arms, ordnance, munition, shot, powder, or habiliments of war, belonging to the United States, or of any victuals provided for the victualling of any soldiers, gunners, marines or pioneers, shall for any turn or gain, or wittingly, advisedly, and of purpose to hinder or impede the service of the United States, embezzle, purloin, or convey away any of the said arms, ordnance, munition, shot or powder, habiliments of war or victuals, that then and in every of the cases aforesaid, the person or persons so offending, their counsellors, aiders and abettors, (knowing of and privy to the offences aforesaid,) shall, on conviction, be fined not exceeding the four-fold value of the property so stolen, embezzled or purloined; the one moiety to be paid to the owner of the goods or the United States, as the case may be, and the other moiety to the informer and prosecutor, and be publicly whipped not exceeding thirty-nine stripes. (*U. S. v. Davis*, 5 *Mason*, 356; *U. S. v. Clew*, 4 *W. C. C.* 700; *U. S. v. Hamilton*, 1 *Mason*, 152; *U. S. v. Coombe*, 19 *Peters*, 72.)

Sect. 17. If any person or persons within any part of the jurisdiction of the United States as aforesaid, shall receive or buy any goods or chattels that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, or shall receive, harbour, or conceal any felons or thieves, knowing them to be so, he or they being of either of the said offences legally convicted, shall be liable to the like punishments as in the case of larceny before are prescribed.

The Act of March 26, 1804, ch. 40, provides,

That any person, not being an owner, who shall, on the high seas, wilfully and corruptly, cast away, burn, or otherwise destroy any ship or other vessel, unto which he belongeth, being the property of any citizen or citizens of the United States, or procure the same to be done, and being thereof lawfully convicted, shall suffer death.

Sect. 2. If any person shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy any ship or vessel of which he is owner, in part or in whole, or in any wise direct or procure the same to be done, with intent or design to prejudice any person, or persons that hath underwritten, or shall underwrite any policy or policies of insurance thereon, or if any merchant or merchants that shall load goods thereon, or any other owner or owners of such ship or vessel, the

person or persons offending therein, being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall suffer death. (*U. S. v. Amesdy*, 11 *Wheat.* 392; *U. S. v. Johns*, 1 *W. C. C. Rep.* 363; *U. S. v. Robinson*, 4 *Massen.* 307.)

The Act of Congress of March 3d, 1825, chap. 65, provides,

Sect. 4. If any person or persons, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, shall commit the crime of wilful murder, or rape, or shall wilfully and maliciously, strike, stab, wound, poison, or shoot at any other person, of which striking, stabbing, wounding, poisoning or shooting, such person shall afterwards die upon land, within or without the United States, every person so offending, his or her counsellors, aiders or abettors, shall be deemed guilty of felony, and shall, upon conviction thereof, suffer death.

Sect. 5. If any offence shall be committed on board of any ship or vessel, belonging to any citizen or citizens of the United States while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of said ship, or any passenger, or any other person belonging to the company of said ship or any other passenger, the same offence shall be cognizable and punishable by the proper circuit court of the United States, in the same way and manner and under the same circumstances as if said offence had been committed on board of such ship or vessel on the high seas and without the jurisdiction of such foreign sovereign or state: *Provided always,* That if such offender shall be tried for such offence, and acquitted or convicted thereof in any competent court of such foreign state or sovereign, he shall not be subject to another trial in any court of the United States.

Sect. 6. If any person or persons upon the high seas, or in any arm of the sea, or in any river, haven or creek, basin or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, shall by surprise, or by open force or violence, maliciously attack or set upon any ship or vessel, belonging in whole or in part to the United States, or to any citizen or citizens thereof, or to any other person whatsoever, with an intent unlawfully to plunder the same ship or vessel, or to despoil any owner or owners thereof of any moneys, goods or merchandize laden on board thereof, every person so offending, his or her counsellors, aiders or abettors, shall be deemed guilty of felony; and shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and by imprisonment and confinement to hard labor, not exceeding ten years, according to the aggravation of the offence.

Sect. 7. If any person or persons, upon the high seas, or in any other of the places aforesaid, with intent to kill, rob, steal, commit a rape, or to do or perpetrate any other felony, shall break or enter any ship or vessel, boat or raft; or if any person or persons shall wilfully and maliciously cut, spoil or destroy any cordage, cable, buoys, buoy-rope, headstap or other fast, fixed to any anchor or moorings belonging to any ship, vessel, boat, or raft, every person so offending, his or her counsellors, aiders and abettors, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offence.

Sect. 8. If any person or persons, upon the high seas, or in any of the places aforesaid, shall buy, receive, or conceal, or aid in concealing any money, goods, bank-notes, or other effects or things, which may be the subject of larceny, which have been feloniously taken or stolen from any other person, knowing the same to have been taken or stolen, every person so offending, shall be deemed guilty of a misdemeanor, and may be prosecuted therefor, although the principal offender chargeable or charged with the larceny, shall not have been prosecuted or convicted thereof; and shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, and imprisonment and confinement to hard labor, not exceeding three years, according to the aggravation of the offence.

Sect. 9. If any person or persons shall plunder, steal, or destroy any money,

goods, merchandize, or other effects, from or belonging to any ship or vessel, or boat, or raft, which shall be in distress, or which shall be wrecked, lost, stranded or cast away upon the sea, or upon reef, shoal, bank or rocks of the sea, or in any other place within the admiralty, and maritime jurisdiction of the United States, or if any person or persons shall wilfully obstruct the escape of any person endeavouring to save his or her life from such ship or vessel, boat or raft, or the wreck thereof, or if any person or persons shall hold out or show any false light or lights, or extinguish any true light, with intention to bring any ship or vessel, boat or raft, being or sailing upon the sea, into danger, or distress, or shipwreck, every person so offending, his or her counsellors, aiders and abettors, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and imprisonment, and confinement to hard labor, not exceeding ten years, according to the aggravation of the offence. (*U. S. v. Coombs*, 12 *Peters*, 72; *U. S. v. Davis*, 5 *Mason*, 356; *U. S. v. Kessler*, *Bald*, 15.)

Sect. 10. If any master or commander of any ship or vessel, belonging in whole or in part to any citizen or citizens of the United States, shall, during his being abroad, maliciously, and without justifiable cause, force any officer or mariner of such ship or vessel on shore, or leave him behind in any foreign port or place, or refuse to bring home again all such of the officers and mariners of such ship or vessel, whom he carried out with him, as are in a condition to return, and willing to return when he shall be ready to proceed in his homeward voyage, every master and commander so offending, shall, on conviction thereof, be punished by fine, not exceeding five hundred dollars, or by imprisonment, not exceeding six months, according to the aggravation of the offence. (*U. S. v. Netcher*, 1 *Story*, 307; *U. S. v. Coffin*, 1 *Sumner*, 394; *U. S. v. Ruggles*, 5 *Mason*, 192.)

Sect. 11. If any person or persons shall wilfully and maliciously set on fire, or burn or otherwise destroy, or cause to be set on fire or burnt, or otherwise destroyed, or aid, procure, abet, or assist in setting on fire, or burning or otherwise destroying any ship or vessel of war of the United States, afloat on the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, every person so offending shall be deemed guilty of felony, and shall, on conviction thereof, suffer death: *Provided*, That nothing herein contained shall be construed to take away or impair the right of any court martial to punish any offence, which by the law of the United States may be punishable by such court.

Sect. 22. If any person or persons upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, on board any vessel belonging in whole or in part to the United States, or any citizen or citizens thereof, shall with a dangerous weapon, or with intent to kill, rob, steal, or to commit a mayhem or rape, or to perpetrate any other felony, commit an assault on another, such person shall, on conviction thereof, be punished by fine not exceeding three thousand dollars, and by imprisonment and confinement to hard labor not exceeding three years, according to the aggravation of the offence. (*U. S. v. Grush*, 5 *Mason*, 290.)

Sect. 23. If any person or persons shall, on the high seas, or within the United States, wilfully and corruptly conspire, combine, and confederate with any other person or persons, such other person or persons being either within or without the United States, to cast away, burn, or otherwise destroy any ship or vessel, or to procure the same to be done, with intent to injure any person or body politic that hath underwritten, or shall thereafter underwrite any policy of insurance thereon, or on goods on board thereof, or with intent to injure any person or body politic that hath lent or advanced, or thereafter shall lend or advance any money on such vessel on bottomry or respondentia, or shall within the United States build or fit out, or aid in building or fitting out any ship or vessel with intent that the same shall be cast away, burnt, or destroyed, for the purpose or with the design aforesaid, every person so offending shall, on conviction thereof, be deemed

guilty of felony, and shall be punished by fine not exceeding ten thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years.

The Act of Congress of March 3d, 1835, Chap. 40, provides:

If any one or more of the crew of any American ship or vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall unlawfully, wilfully, and with force or by fraud, threats or other intimidations, usurp the command of such ship or vessel from the master or other lawful commanding officer thereof, or deprive him of his authority and command on board thereof, or transfer such authority and command to any other person not lawfully entitled, thereto, every such person so offending, his aiders or abettors, shall be deemed guilty of a revolt, or mutiny and felony, and shall, on conviction thereof, be punished by fine not exceeding two thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years, according to the nature and aggravation of the offence.

Sect. 2. If any one or more of the crew of any American ship or vessel on the high seas, or any other waters within the admiralty and maritime jurisdiction of the United States, shall endeavour to make a revolt or mutiny on board such ship or vessel, or shall combine, conspire, or confederate with any other person or persons on board to make such revolt or mutiny, or shall solicit, incite, or stir up any other or others of the crew to disobey or resist the lawful orders of the master or other officer of such ship or vessel, or to refuse or neglect their proper duty on board thereof, or shall unlawfully confine the master or other commanding officer thereof, every such person so offending shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence.

Sect. 3. If any master or other officer of any American ship or vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall from malice, hatred, or revenge, and without justifiable cause, beat, wound, or imprison any one or more of the crew of such ship or vessel, or withhold from them suitable food and nourishment, or inflict upon them any cruel and unusual punishment, every such person so offending shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence. (*U. S. v. Matthews*, 2 Sumn. 470; *U. S. v. Cassidy*, 2 Sumn. 582; *U. S. v. Rogers*, 3 Sumn. 342; *U. S. v. Taylor*, 2 Sumn. 584.)

The Act of Congress of March 3d, 1847, provides:

That any subject or citizen of any foreign State, who shall be found and taken on the sea, making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the State of which such person is a citizen or subject, when by such treaty such acts of such persons are declared to be piracy, may be arraigned, tried, convicted, and punished before any circuit court of the United States, for the district into which such person may be brought, or shall be found, in the same manner as other persons charged with piracy may be arraigned, tried, convicted, and punished in said courts.

U. S. v. Jas. McGill, 4 Dall. 426. was an indictment for murder, (founded on the 8th sect. of the act of April 30, 1790, ch. 9.) the mortal blow was given on ship board in the harbour of Cape Francois. The prisoner was taken on shore, and died the next day. The Court held that the death, as well as the mortal stroke, must happen on the high seas to constitute a murder there. (This case has since been provided for by the 4th section of the act of March 3, 1825.) And Washington, J., held that the words of the Constitution must be taken to refer to the "admiralty and maritime jurisdiction" of England, independent of acts of parliament.

U. S. v. Bevans, 3 Wheat. 336. was an indictment for murder (founded on the 8th sect. of act of 1790,) committed on board a United States' ship of war lying

at anchor in Boston harbour. To and beyond the position where she lay the civil and criminal jurisdiction of the Courts of Massachusetts had constantly been served and obeyed. The Supreme Court held, that whatever may be the constitutional power of Congress under the clause extending "the judicial power of the United States to all cases of admiralty and maritime jurisdiction," they have not so exercised it in the 8th section of the act of 1790, as to give to the United States courts jurisdiction over a river, haven, basin or bay, which is within the jurisdiction of any particular State.

That it is not the offence committed, but the place of its commission, which must be without the cognizance of the State jurisdiction.

The phrase, "or in any other place," &c. as contained in the 3d section of the act of 1790, cannot be construed as referring to the deck of a United States ship of war, on board of which a murder may be committed.

U. S. v. Palmer, 3 Wheat. 610. Under the 8th sect. of the act of 1790, a robbery on the high seas is piracy, though if it were committed on land, it would not be punished capitally by the laws of the United States; and the courts of the United States have jurisdiction of such offence. Robbery, by one who is not a citizen of the United States, committed on the high seas, on board a vessel owned by foreigners exclusively, is not piracy under that section of the statute, nor punishable in the courts of the United States.

U. S. v. Wiklberger, 5 Wheat. 76. was an indictment for manslaughter (founded on the 12th sect. of the act of 1790) committed on board an American merchant ship lying in the river Tigris, in fresh water, off Wampoa, about one hundred yards from the shore. It was contended that the phrase "manslaughter upon the high seas," in the 12th sect. of the act of 1790, was to be construed in connexion with the phrase, "any river, haven, basin, or bay," as contained in the 3d sect. of the act.

The Supreme Court rejected this construction of the act, and enforced the rule that penal statutes must be construed strictly; "holding that *extreme improbability* that Congress would have intended to make those differences with respect to place which their words import, is not a guide which a court, in construing a penal statute, can safely take.

U. S. v. Furlong, 5 Wheat. 134. It is competent under an indictment for piracy for the jury to find, that a vessel within a marine league of the shore; at anchor in an open roadstead, where vessels only ride under shelter of the land at a season when the course of the winds is invariable, is upon the high seas.

The words out of the jurisdiction of any particular State in the act of 1790, means State of the Union.

U. S. v. Klintock, 5 Wheat. 144. The act of 1790, sect. 8. extends to all persons on board all vessels which throw off their national character by cruising piratically, and committing piracy on other vessels.

U. S. v. Holmes & al. 5 Wheat. 412. Under the 8th sect. of the act of 1790, if the offence be committed on board a foreign vessel by a citizen of the United States, or on board a vessel of the United States by a foreigner, or by a citizen or foreigner on board a piratical vessel, the offence is equally cognizable by the United States' courts; and it makes no difference whether the offense was committed on board a vessel or in the sea.

U. S. v. Pirates, 5 Wheat. 200. A vessel lying at anchor in an open roadstead at the island of Bonavista, was held to be "on the high seas," within the 8th sect. of the act of 1790.

U. S. v. Coombs, 12 Peters, 72. In cases purely dependent upon the locality of the act done, the jurisdiction in the United States is limited to the sea and to tide waters, as far as the tide flows, but it does not reach beyond high water mark.

U. S. v. Ross, 1 Gall. 624. The Circuit Court has cognizance under the act of the 30th April, 1790, of piracy on board of an American ship, although committed in an open roadstead, adjacent to a foreign territory and within half a mile of the shore. The "high seas" in that act mean any waters on the sea-coast which are without the boundary of low-water mark.

U. S. v. Kessler, Baldwin's Reps. 15, was an indictment for robbery and

piracy on the high seas, on board a brig called "L'Eclair," a foreign vessel, belonging exclusively to French owners, and sailing under the French flag, it was held, that under the acts of Congress the United States' Courts had no jurisdiction to try and punish the offence.

U. S. v. Thompson, 1 Sumner, 170. The provision in the act of 1790 for the trial of offenders, is in the alternative, so that it may be either in the district where he is apprehended, or in that into which he is first brought.

U. S. v. Davis, 2 Sumner, 483. A gun was fired from an American vessel, lying in a harbour of one of the Society Isles, by which a person on board a schooner belonging to the natives and lying in the same harbour, was killed; held, that the act in contemplation of law was done on board the foreign schooner, where the shot took effect, and that jurisdiction of it belonged to the foreign government, and not to the courts of the United States under the act of 1790.

U. S. v. Smith, 1 Mason, 147. A vessel lying on the sea, outside of a harbour of the United States, within three miles of the shore, is on the high seas.

U. S. v. Hamilton, 1 Mason, 152. The waters of havens, where the tide ebbs and flows, are not properly the high seas unless without low-water mark.

U. S. v. Robinson, 4 Mason, 307. An offence committed in a bay that is entirely land-locked and enclosed by reefs, is not committed on the high seas within the act of 28th March, 1804.

U. S. v. Grush, 5 Mason, 399. The State courts have jurisdiction of offences committed on arms of the sea, creeks, havens, basins, and bays within the ebb and flow of the tide, where those places are within the body of a county; and in such cases the Circuit Courts of the United States have no jurisdiction under the crimes act of 1825.

Where an arm of the sea, or creek, haven, basin, or bay is so narrow, that a person standing on one shore can reasonably discern and distinctly see, by the naked eye, what is doing on the opposite shore, the waters are within the body of a county. In such waters the admiralty and common law have concurrent jurisdiction.

Chancellor Kent says: "The acts of Congress of April 30th, 1790, ch. 9, and of March 3d, 1825, ch. 67, are not sufficiently precise on the subject of the criminal jurisdiction of the admiralty over crimes committed on the high seas. . . . It is difficult to understand exactly what was intended by the diversity of language in different sections, being general in one and specific in another, so far as those various sections have not been construed or defined by judicial decisions. We may safely say, that so far as any crime committed upon the high seas, no matter by whom or where, amounts to piracy within the provision of the law of nations, there can be no doubt of the jurisdiction of the Circuit Courts of the United States. But where the crime has not attained 'that bad eminence,' there the jurisdiction can only, upon proper principles, attach to crimes committed by American citizens upon the high seas, or to crimes committed in or upon an American vessel upon the high seas. If the American citizen commits the crime on the high seas, on board of a foreign vessel, the personal jurisdiction over the citizen, in that case, if it exist at all, must be concurrent with the jurisdiction of the foreign government to which the vessel belongs, or by whose subjects it is owned. Under the 8th section of the act of April 30th, 1790, if an offence be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, or by a citizen or foreigner on board of a piratical vessel, it is cognizable by the courts of the United States." 4 Comms. 363.

CHAPTER IV.

CONCERNING GENERAL COMMISSIONS OF OYER AND TERMINER.

JUSTICES of *oyer* and *terminer* are of two kinds, viz. *Justiciarii ordinarii*, such is the court of king's bench, the supreme ordinary court of *oyer* and *terminer*, and is comprised within the statutes, that give power to justices of *oyer* and *terminer*, as hath been already said.

The delegate or commissionate justices of *oyer* and *terminer* are those, who are by commission, which usually is granted in the circuits directed to justices of assise and divers others, or any three of them, whereof commonly one of the justices of assise is of the *quorum*; and it is ad inquirendum per sacramentum proborum & legalium hominum of the [23] several counties de quibuscunque proditionibus, &c. and divers other offenses therein mentiond, ac de omnibus injuriis & malefactis quibuscunque in comitatibus Bucks, &c. eaque omnia audiendum & terminandum, facturi inde quod ad justitiam pertinet secundum legem & consuetudinem regni Angliæ, &c. and this to be done tam infra libertates quam extra.

This commission is specially called a commission of *oyer* and *terminer*; and therefore, altho justices of peace have a clause in their commission *ad audiendum & terminandum* felonies, &c. yet justices of peace come not under the name of justices of *oyer* and *terminer* within those acts of parliament, that mention justices of *oyer* and *terminer*; as upon the statute of 5 *Eliz. cap. 14.* for forgery, as shall be said farther hereafter in the chapter of justices of peace. 9 *Co. Rep.* 118. b. lord *Sanchar's* case, *Co. P. C. cap. 41. p.* 103.

But the justices of the court of king's bench are the sovereign ordinary commissioners of *oyer* and *terminer*, as hath been before said.

My lord *Coke* in his 4 *Instit. cap. 28 & 30.* hath laid together the learning of the courts of *oyer* and *terminer* and gaol-delivery, whose method I shall follow.

Commissioners of *oyer* and *terminer* before their sessions, issue a precept to the sheriff much of the same form as commissioners of gaol-delivery do; see the form thereof, *Rast. Entries* 443. b. title *oyer* and *terminer.* 1 *E.* 3.

1. The justices of *oyer* and *terminer* in criminal causes cannot be by writ, but must be by commission under the great seal; otherwise their proceedings are void. 42 *Assiz.* 12.

2. Both in commissions of *oyer* and *terminer* and of gaol-delivery, and other commissions of like nature directed to one or more, there may be additional commissions of association, and thereupon writs are to issue to the former commissioners *de admittendo in societatem*; and if all cannot attend the session, a writ of *Si omnes interesse non positis, tunc vos tres vel duo vestrum, quos præsentibus esse contigerit, (quorum aliquem vestrum, A. B. vel C. D. unum esse volumus,) ad præmissa faciendū intendatis. &c. Vide F. N. B. p. 111, 112.*

3. Justices of *oyer* and *terminer* or gaol-delivery, if [24] they once sit without adjournment, their commission is determined; but tho they be appointed only *pro hac vice*, yet they may continue their sessions from day to day by adjournment; the like for all other commissions.

But it is not always necessary nor usual to enter their adjournment on record, (tho it might be fit in many cases,) and then if it be not entered on record, their session always relates to the first day, and so are their records entered as of the first day of the session.

But in some cases it is absolutely necessary to enter their adjournments on record, as where an indictment is taken the first day of the session before justices of *oyer* and *terminer*, and they make a precept to the sheriff to return a jury the next day, or at any following day, upon the prisoner's plea of not guilty, there must be a record made of the adjournment of the sessions to that day, otherwise it will be erroneous, (because without such entry the whole sessions will be supposed in law to be held the first day,) and out of the sessions; the like for justices of peace.

So if after the first day of the sessions either of *oyer* and *terminer*, or gaol-delivery, there be a felony committed, and the party indicted for it; there must be an entry of the adjournment, at least till the day of the indictment taken, because otherwise the felony will be supposed in law to be committed after the determination of the sessions. 14 Car. 1. *Sampson's case.*(a)

4. Commissions of *oyer* and *terminer*, gaol-delivery, and regularly all other commissions are determined by one of these four ways. 1. By a session and non-adjournment, as before. 2. By the king's death: yet it is held, tho in strictness of law the commissions be determined by the king's death, so as no proclamation without an act of parliament can give them continuance, but they must have new commissions, *Croke, 1 Car. 1. p. 1.* yet the acts they do by virtue of these commissions after the king's death, and before notice thereof, stand good. *M.*

(a) *W. Jones, 420.*

3. *Car. O. B. Croke*, p. 97, 98. in *Sir Randolph Crew's case*.(*)
 3. By express *Supersedeas* by a writ; but this *Supersedeas* by writ, tho it be a *Supersedeas omnino*, yet [25] is not an absolute repeal of the commission, but only a suspension, for it may be renewed again by a writ of *Procedendo*, 12 *Assiz.* 21. adjudged. 4. By the issuing a new commission of the same nature in the same county, and notice thereof.

And therefore before the former commission be determin'd, there must be notice, which is, of three kinds. 1. By shewing the new commission; this determines the former, as to all those and those only to whom it is shewn. 2. By a proclamation of the latter commission in the county; this determines the former commission, wholly. 3. By a session in the county by force of the latter commission in the county. *Coke*, 4 *Instit. cap.* 28. p. 165.

If a general commission of *oyer* and *terminer*, gaol-delivery, or the peace, issue for the county at large; and afterwards a special commission of the like nature for one town, or for the *loca maritima* of that county, this new commission, with notice as before, doth determine the general commission *pro tanto*. 25 *Eliz. Lacie's case*, 1 *Leon*, n. 363. p. 270. & *supra*, cap. *præcedente*.

And so *è converso*, if a special commission of *oyer* and *terminer*, gaol-delivery, or the peace, issue for a particular town or city, not being a county, or for the *loca maritima*, a general commission of the like nature in the county, with such a notice as before, determines the special commission: [26] But by the statute of 2 & 3 *P. & M. cap.* 18. this is helped as to special commissions in cities and towns corporate, as hath been before said; but *that* statute is to be intended only of towns or cities, as it seems, (*quære*) and extends not to com-

(*) But now by 7 & 8 *W. 3. cap.* 27. and 1 *Ann. cap.* 8. it is enacted, "That no commission either civil or military, That no patent or grant of any office or employment either civil or military, That no commission of assize, *oyer* and *terminer*, general gaol-delivery, or of association, writ of admittance, writ of *si non omnes*, writ of assistance, or commission of the peace shall be determin'd by the demise of any king or queen of this realm, but shall continue in full force for six months next ensuing notwithstanding such demise, unless superseded and determin'd by the next successor: And also no original writ, writ of *Nisi prius*, commission, process, or proceedings whatsoever in, or issuing out of any court of equity, nor any process or proceeding upon any office or inquisition, nor any writ of *Certiorari*, or *Habeas Corpus* in any matter or cause either criminal or civil, nor any writ of attachment, or process for contempt, nor any commission of delegacy, or review for any matters ecclesiastical, testamentary, or maritime, or any process thereupon shall be determin'd, abated or discontinued by the demise of any king or queen of this realm, but shall remain in full force, as if such king or queen had lived."

missions of *oyer* and *terminer*. 4 *Co. Instit.* p. 165. in *marginē*.

But if there be a general commission of *oyer* and *terminer*, or gaol-delivery, or peace for the whole county, and a special commission of the same nature to a liberty, hundred, or other precinct, as in a hundred, liberty, or franchise within the county, and both bear *teste* the same day, they all stand. Thus it is in *Suffolk*, where there have been always three commissions of gaol-delivery to the justices of assize, one for the county at large, another for the franchise, another for the town of *Bury*, and they impanel several grand juries, and sit and act respectively by each commission.

And the justices of gaol-delivery in the franchise must sit in the franchise by the statute of 27 *H. 8. cap. 24.* and the reason is, because antiently the abbots of *St. Edmund's-Bury* did by virtue of the king's letters patent, constitute their own justices of gaol-delivery in the franchise and town; and therefore the sessions of gaol-delivery is fittest to be held at *Bury*; but the commission of *oyer* and *terminer* extends *tam infra libertates, quàm extra*; but of this *vide cap. prox.*

But a commission of one nature doth not supersede a commission of another nature, as a commission of *oyer* and *terminer* is not repealed by a subsequent commission of gaol-delivery or the peace, nor *è converso*, for they are of several natures. 3 *Mar. B. Commission 24.*

These things before-mentioned are common to all judiciary commissions; these that follow, more particularly concern general commissions of *oyer* and *terminer*.

1. Regularly upon the commission of *oyer* and *terminer* there should issue a precept to the sheriff in the name of three commissioners at least, whereof one of the *quorum*, and under their particular seals, bearing date fifteen days at least before their session, to the sheriff to return twenty-four for a grand inquest *ad inquirendum, &c.* at such a day; and the [27] sheriff is to return his panel annexed to the precept.

2. Regularly the commissioners of *oyer* and *terminer* cannot proceed upon any indictment taken before others than themselves. 3 *Mar. B. Commission 24.* And therefore they cannot proceed upon the coroner's inquest, or upon an indictment of felony before justices of peace.

But this rule hath two exceptions. 1. That it is only intended of a general commission of *oyer* and *terminer*, for, as hath been shewn, there may be a special commission to determine a treason or felony taken before other commissioners of *oyer* and *terminer*, *Plowd. Com. p. 390. Casus com' Leicest.*; nay, or by the coroner or justices of the peace. 2. That it doth not

extend to an inquisition taken before other commissioners of *oyer* and *terminer*; for it is and always hath been the constant practice to take indictments before commissioners of *oyer* and *terminer*, as for highways, barrettry, forgery, perjury, &c. and to try them before other commissioners of *oyer* and *terminer* at another subsequent sessions; and if there were any doubt of that at common law, yet the statute of 1 E. 6. cap. 7. hath settled it, viz. "That no process or suit made before the justices of assise, gaol-delivery, *oyer* and *terminer*, justices of peace, or any the king's commissioners, shall be in any wise discontinued by making or publishing any new commission or association, or by altering the names of the justices; but the new justices of assise, gaol-delivery, and the peace, or other commissioners may proceed in every behalf, as if the old commissions, justices and commissioners had still remaind and continued not altered."

And this gives power to the justices of *oyer* and *terminer*, &c. to proceed upon indictments taken by former justices of *oyer* and *terminer*, as well in cases of treason or felony, as other misdemeanors.

3. In case where a felon or traitor, &c. pleads to an indictment taken before justices of *oyer* and *terminer*, they ought not, (as in case of justices of gaol-delivery,) to award a precept *ore tenus* to the sheriff to return a jury, but it must be by precept in the names and under the seals of the [28] commissioners, or three of them, whereof one of the *quorum*. 4 Co. Instit. cap. 30. p. 168. & *ibidem* cap. 28. p. 164. and the sheriff ought to return the pannel filed to the precept.

4. But the indictment may be preferred, issue joined, precept made and returned, and prisoner tried the same day before commissioners of *oyer* and *terminer*: see the precedents cited 4 Co. Instit. cap. 28. p. 164. P. 16 Car. 1. B. R. Croke 583. resolved *per omnes Justiciarios Angliæ*, altho there were no commission of gaol-delivery in that case, but only of *oyer* and *terminer*. Accords H. 9 Car. B. R. Chapman's case for barrettry before justices of *oyer* and *terminer*. 2 Roll. Abr. p. 96. And the same law is questionless for justices of gaol-delivery. T. 9 Car. B. R. Croke 315.

But in cases of justices of the peace it hath been held, that they cannot try the same session that the party pleads to the indictment, much less the same he is indicted. 22 E. 4. Coron. 44. H. 11 Car. 1. B. R. Croke, p. 438 & 448. adjudged in cases not capital, *Bumsted's* case in an indictment of extortion, and accordingly ruled T. 23 Car. B. R. *Pue's* case for seditious words. 2 H. 8. Kelw. 259.

But yet it hath been held good even before justices of peace to receive an indictment, and put the party, if present, to plead to it, and try it the same sessions, *T. 14. Jac. B. R. Cro. 404. Rice's case* adjudged good, *4 Co. Instit. cap. 28. p. 164. without question they may*: And there can be no difference assigned between sessions of the peace and *oyer and terminer* in this case, nor between causes criminal and capital, for the offenses rise in the same county, and as there goes out a summons of gaol-delivery, so there issues a general summons of the sessions of the peace; and that all constables, &c. then attend; *quod vide Crompt. de pace, f. 232. a. 2 Co. Instit. super Articulis, cap. 15. p. 568.*

Yet in respect of this contrariety of opinion, the use hath commonly obtained, that in cases not capital both before justices of *oyer and terminer*, and of the peace, he that traverseth an indictment, hath time to try it till the next session; but [29] where the party is in prison, the justices of gaol-delivery put him to answer, and try it presently.

But in all treasons and felonies, as well before justices of *oyer and terminer* or of peace, as well as before justices of gaol-delivery, the constant course, is to indict the party, put him to plead, try him, and give judgment, and all at the same sessions; and it is fit to hold the course according to the modern usage; but it seems to me, that in all cases criminal or capital, justices of *oyer and terminer* may *de rigore juris* proceed to indictment, trial and judgment the same sessions.

5. The court of the general commissioners of *oyer and terminer*, as likewise that of the gaol-delivery and of assise, comes under the name of a court of record in relation to those offenses, that by act of parliament are directed to be punished in any court of record; as the statute of 5 & 6 E. 6. cap. 14. of fore-stallers, &c. and the statute of 33 H. 8. cap. 9. of unlawful games, by the opinion of my lord *Coke*, *4 Instit. cap. 28. p. 164.* and according to him, if it be limited to be punished in any of *his majesty's* courts of record.

But there is a great authority against this, and that in such cases, especially the latter, it only extends to the four great courts at *Westminster*, as upon the statute of drapery, 4 & 5 P. & M. cap. 5. which is, that the penalties of that act shall be recoverd by action, bill, plaint or information, or otherwise in *any court of record*, wherein no essoin, protection, wager of law, or injunction shall be allowd; this extends only to the four courts of *Westminster*, *Gregory's case*, 6 Co. Rep. f. 19. b. of tillage, labourers, &c. (e) to be recoverd in any of the queen's

courts of record, by the opinion of all the judges except *Catlin*, *Sanders* and *Whiddon*, extends only to the four courts of *Westminster*, and not to commissioners of *oyer* and *terminer*; but otherwise it is, if no court be appointed. *M. 6 & 7 Eliz. Dy. 236. a.*

Again, by the statute of 23 *H. 8. cap. 4.* against brewers for selling beer by less measure than is appointed by the act, the penalty half to the king half to the [30] informer, to be recovered by action of debt, bill, plaint, or information in any of the king's courts, wherein no wager of law, essoin, protection or privilege shall be allowd, *T. 4 Car. C. B. Croke, p. 112. Farrington's case*: Ruled, that notwithstanding the statute of 21 *Jac. cap. 4.* this information lies in the common bench, because the justices of *Nisi prius*, *oyer* and *terminer*, or of the peace, or gaol-delivery cannot hold plea upon this statute, because these justices cannot allow an essoin or protection; and the statute of 23 *H. 8.* extends only to such courts as can allow a protection, &c. and accordingly I have known it resolved upon the statute of 7 *E. 6. cap. 5.* for wines; and about 23 *Car. 2.* it was resolved upon a writ of error in the exchequer-chamber, upon a judgment given in the exchequer for *Foly* a defendant in an information upon the statute of 1 *Eliz. cap. 15.* (whereby the cutting of timber within fourteen miles of a navigable river is prohibited on pain of forfeiting of forty shillings for every tree, a moiety to the queen, and a moiety to the informer, to be recovered by original writ, bill, plaint or information, wherein no essoin, protection, wager of law, or injunction shall be allowd,) that this extends not to the commissioners of *oyer* and *terminer*, nor other courts in the country, but only to the four courts at *Westminster*. 1. Because original writs are not returnable before them. 2. They cannot allow or disallow protections or essoins; whereupon the judgment for costs was affirmed; and yet here is no mention of any court, or court of record, or his majesty's courts, but purely upon these two reasons.

And yet I believe hundreds of informations have been before justices of *oyer* and *terminer* and *assise*, yea and of the peace in the country upon several acts, that have the like clauses, as 35 *H. 8. cap. 7.* for the preservation of woods, and infinite others according to my lord *Coke's* opinion, but when it hath come to be judicially debated, I have not known it to obtain; but the resolution in *Farrington's* case and in *Gregory's* case have still been allowd.

6. Commissioners of *oyer* and *terminer* cannot assign a coroner to an approver, nor justices of peace, but justices of gaol-delivery may. 4 *Co. Instit. p. 165. Stamf. P. C. p. 143. b.* [31]

7. By the statute of 5 E. 3. cap. 11. justices of *oyer and terminer* may issue process of outlawry in any county of *England* against persons indicted before them, and also a *capias ullegatum* against persons outlawed.

8. By the statute of 9 E. 3. cap. 5. justices of *oyer and terminer*, gaol-delivery, and assise are to send their records and processes determin'd and put in execution to the exchequer at *Michaelmas* once every year under their seal, to be kept by the treasurer and chamberlains, but are to take out their *estretes* first.

9. All the precepts and processes of justices of *oyer and terminer* regularly are to be in the names and under the seals of the justices (*viz.* three of them, one of the *quorum*;) and altho at this day there is no other warrant for the execution of prisoners condemned, but a calendar left with the sheriff under the hand of the justice that sits, yet antiently there was a warrant under their hands and seals, and in the names of the commissioners. *Co. P. C. p. 31.*

But if the prisoner be in custody of the sheriff, the truth is, there is no need of any warrant or calendar, for the open pronouncing and entring of the judgment *Suspendatur* is a warrant for the execution, and so it is in the king's bench, the entry on record of the judgment with a *præceptum est marescallo quod faciat executionem periculo incumbente*, without any formal writ or precept of the court is sufficient, and more is not usual: and the calendar subscribed by the judge of gaol-delivery is but a memorial; and *Rolle* would never sign any calendar, but gave his orders openly in court with a charge to the sheriff and gaoler to take notice of them.

More may occur touching these matters in the next chapter.

[32]

CHAPTER V.

TOUCHING JUSTICES OF GAOL-DELIVERY.

THIS court is by commission under the great seal directed commonly to five or any two of them, *quorum aliquem vestrum A. B. vel C. D. unum esse volumus ad gaolam nostram comitatûs nostri S. de prisonibus in eâ existentibus deliberandis*; see the whole tenor of the commission. 4 *Co. Instit. cap. 30. p. 168.*

1. By the statute 3 R. 2. cap. 2. no man of law shall be justice of assise or common deliverance of the gaol in his own country; this statute is expounded by 33 H. 8. cap. 24. to be meant

of the county, where he dwelleth; and as to justices of assise a penalty of one hundred pounds is added, if he exercises that office in the county where he is born or doth inhabit; but both these acts are usually dispensed with by a special *non obstante*.

By a special privilege by charter granted to the city of *London* the lord mayor is of the *quorum*, 2 R. 3. 11. a. and so it is in the city of *Norwich*.

2. Justices of gaol-delivery may proceed against prisoners (if in gaol) upon inquisition before the coroner or any other justices; and therefore justices of peace must send in their indictments not determind unto the justices of gaol-delivery to be proceeded upon, whether they be felonies or trespasses, if the party be in gaol or set to bail: *Stat. 4 E. 3. cap. 2.*

3. The justices of gaol-delivery after their commission sealed do, or should issue a precept to the sheriff importing these things, *viz.*

1. That upon such a day and place, Venire facias omnes prisiones in prisonâ domini regis com' prædict' existentes vel per ipsum per manucaptionem dimiss. cum eorum attachiamenis & omnibus aliis eorum deliberationem tangent' & penes se remanent'. 2. Quòd Venire facias *at the day and* [33] *place* 24 legales homines de quolibet hundredo ad inquirendum pro domino rege & corpore comitatûs prædicti. 3. Ac alios 24 probos & legales homines de comitatu prædicto ad faciendam juratam inter dominum regem & prisiones prædictos. 4. Et proclamari facias dictam deliberationem gaolæ in omnibus civitatibus, burgis & aliis locis, quòd omnes, qui sequi voluerint versus prisiones prædictos pro domino rege vel se ipsis, ad tunc sint ibi in formâ juris prosecuturi. 5. Scire facias etiam omnibus Justiciariis ad pacem comitatûs prædicti, coronatoribus, capitalibus constabulariis pacis, majoribus, ballivis, senescallis magnatûm, ballivis hundredorum & libertatûm, quòd tunc sint ibi ad faciendum quod ad officium suum pertinet, & tu ad tunc sis ibi unâ cum ballivis & ministris suis ad faciendum ea, quæ tuo & eorum officio incumbunt. 6. Et habeas ibi tam nomina Justiciariorum ad pacem, coronatorum, capitalium constabulariorum pacis, senescallorum magnatûm, ballivorum hundredorum & libertatûm, quàm juratorum prædictorum, & hoc præceptum.

This precept is made in the king's name, or in the name of the justices of gaol-delivery, *Vide formam, inde Rast. Entries, p. 385. a. Gaol-delivery.* 1. Venire facias de quolibet hundredo 24 tam milites, quàm alios(*) & de qualibet villatâ, ubi dicti prisiones indictati existunt, quatuor homines & præposi-

(*) The words in *Rastel* are *liberos & legales homines*.

tum ad faciendum ea, quæ ex parte domini regis tunc ibidem injungentur.

This is not unlike the summons of the *Iters* formerly, nor altogether unlike the summons of the sessions of the peace, *quod vide Crompton de pace*, p. 332. a. which is in the king's name, and so may this, with the *Teste* of the chief justice: Or it seems it may be in the name of the justices of gaol-delivery and under their seal; *vide simile* in *Holcraft's* case, *Co. Entries*, 55. by the justices of gaol-delivery for the verge; this precept is accordingly returned, the justices of peace, coroners, mayors, bailiffs of hundreds, and liberties, constables of hundreds, and names of the grand inquest returned and called in order.

4. And therefore it hath never been a question, but [34] that the justices of gaol-delivery may take an indictment, try, and give judgement the same day. 22 E. 4. *Coron.* 44.

5. But altho this solemnity of summons of the gaol-delivery may be, and should be used, yet they may command the sheriff *ore tenus*, to return a pannel without any precept in writing to him, (as is necessary in case of justices of *oyer* and *terminer*;) and the reason is given, because there is a general command to the sheriff by the summons of the gaol-delivery to return twenty-four to try prisoners. 4 H. 5. *Enquest* 55. 4 *Co. Instit.* cap. 30. p. 168.

6. They may deliver by proclamation persons imprisond, where either no indictment is preferd, or an indictment preferd and *ignoramus* found, which is said cannot be done by justices of *oyer* and *terminer*, or of the peace. 2 R. 3. *Corone* 47.

7. They may originally take indictments of felony of such prisoners as are in gaol; this hath been accordingly resolved and is the constant practice, and so may justices of *oyer* and *terminer*: So that when the prisoner is in gaol, both have a concurrent jurisdiction. 4 *Co. Instit.* cap. 30. p. 168 & 169. and accordingly it was resolved in the case of *Apharry* and *Morgan*, P. 29 *Eliz.* there cited. And therefore the case of 3 Mar. B. *Commission* 24. and *Pasch.* 32 *Eliz.* B. R. *Purcell's* case, *Croke*, n. 10. p. 179. wherein it is said, that justices of gaol-delivery cannot take an indictment, unless they be also justices of peace, and then they may take an indictment as justices of peace, and try him as justices of gaol-delivery, is to be intended, where the offender is at large and out of prison, for if he be in prison, the indictment against him may be taken before them as justices of gaol-delivery, or as justices of *oyer* and *terminer*, or of the peace.

8. And therefore justices of *oyer* and *terminer*, gaol-delivery, and of the peace may make up their record by all three of the powers; and if it be good by one commission or by the other, it is good and not erroneous, and the best shall be taken for the king. 9 *H. 7. 9. a. 3. Mar. B. Commission 24. Crompt. Jurisdiction de Courts* 226.

9. If a person be let to bail, yet he is in law, in prison, and his bail are his keepers, and therefore the [35] justices of gaol-delivery may take an indictment against him, as well as if he were actually in gaol; but he that is let to mainprise is not in custody, 21 *H. 7. 33. a. 9 E. 4. 2. a. 39 H. 6. 27. b.* in the one case the entry is *traditur in ballium*. in the other *deliberatur per manucaptionem*.

10. They may take an indictment against persons for high treason, if they be in gaol, and may try and give judgment upon them, as well as commissioners of *oyer* and *terminer* against the opinion delivered *H. 15 Jac. B. R. Bumpsted's case*.

This appears by the statute of 1 *E. 6. cap. 7. vide 4 Co. Instit. p. 169. & libris ibi*, and it is constant experience.

11. By the statute of 1 *E. 6. cap. 7.* the subsequent commissioners of gaol-delivery have power to give judgment upon a person reprieved after conviction, and altho it be made a *quære*, *Dy. 205. a.* whether they may as well award execution upon a judgment given by the former commissioners of gaol-delivery, &c. yet it seems to be without question they may. 1. Upon the very common law, if a person be indicted and outlawed for felony before justices of peace, yet if he be in prison the justices of gaol-delivery have power to award execution upon that outlawry, for they are constituted *ad gaolam deliberandam* 15 *H. 7. 5. b.* agreed, and certainly if there had been any doubt of that, the statute of 1 *E. 6.* would have made as special a provision for awarding execution upon a judgment given by former commissioners, as for giving judgment upon a conviction before them. 2. But if there were any doubt thereof at common law, yet the statute of 1 *E. 6. cap. 7.* hath sufficiently enabled them thereunto by the last clause thereof, *viz.* that notwithstanding the altering of the commissions of assise, *oyer* and *terminer*, gaol-delivery, or the peace *the new justices may proceed in every behalf, as if the old commissions or commissioners had continued not altered.*

12. They may receive appeals by bill against any person being in gaol.

13. They may assign a coroner to an approver, and make out process against the appellee in a foreign [36] county by the statute of 28 *E. 1.*

14. The sheriff is to deliver unto the justices of gaol-delivery the names of all persons in gaol, or that are bailed or let to mainprise by him for felony by the statute of 3 *H. 7. cap. 3.*

15. If a statute limit specially an offense to be heard and determined by the justices of peace, as that of 3 *H. 8. cap. 5.* it is doubtful whether justices of gaol-delivery, yea of *oyer* and *terminer* may hear and determine it; but upon the statute of 7 *H. 7. cap. 1.* which speaks only of justices in the county, either the commissioners of *oyer* and *terminer* or gaol-delivery may hear and determine it.

16. By the statute of 3 *H. 8. cap. 12.* The justices of gaol-delivery or of the peace, have power in open session to reform all pannels returned before them, by putting out and putting in names of persons, which pannels so reformed, shall be accordingly returned by the sheriff: And *note*, this command is *ore tenus*.

And hence it comes to pass, that altho upon trials of felons in the king's bench, or *oyer* and *terminer*, if the prisoner challenge twenty peremptorily, as he may, so that there be not sufficient remaining of the pannel, there is to be a *Tales* granted by precept returnable as the case requires; yet before justices of gaol-delivery the prisoner gets no time by it, for the sheriff by the command of the court *ore tenus*, may enlarge the pannel without any formal precept: *Vide Stamf. P. C. Lib. III. cap. 5. fol. 155. b.* and therefore *Tales* are not granted by precept before justices of gaol-delivery, which much expedites all business before them.

17. By the statute of 9 *E. 3. cap. 5.* The records before them determined are to be delivered to the treasurer and chamberlains of the *Exchequer* at *Michaelmas* yearly.

18. By the statute of 34 *H. 8. cap. 14.* The clerks of the crown, clerks of assise, and clerks of the peace are to certify into the king's bench the names of all persons outlawed, attainted, or convicted, and upon letter from the justices [37] aforesaid certificates shall be made of such persons outlawed, attain, or convict, to the justices of gaol-delivery.

19. Justices of gaol-delivery may send prisoners by *Habeas Corpus* to the sheriff of another county, and a precept to the sheriff of that other county to receive them, namely, for a felony committed in that county, tho that county be out of the circuit of the justice that sends them; and tho I once knew it scrupled, yet I think the law is clear in it; *vide 1 & 2 P. & M. cap. 13. in fine*; for of necessity the justices of gaol-delivery have in some cases power out of the precincts of their county or circuit; as where an approver appeals a person in a foreign county, and

this is certified, as it ought, to the justices of gaol-delivery, where the approver is, the justices of gaol-delivery, may make out process of *capias*, and it seems also of *exigent* against the appellee, and yet he is neither in gaol nor in the same county. 29 E. 3. 42. a. *Corene* 462.

But upon an inquisition before the coroner returned before justices of gaol-delivery they cannot make process of outlawry; *vide petitionem indè in parlamento*, 29 E. 3. n. 22. *sed non obtinuit*; but the answer was only, *Soit l' auncient ley sur ceo use*.

20. *A.* and *B.* are indicted before the justices of peace of *Middlesex*, and according to the statute of 4 E. 3. cap. 1. the indictment is delivered over to the justices of the gaol-delivery of *Newgate*: *A.* appears and is tried and acquitted, *B.* appears not. 1. The justices of peace cannot make out process against *B.* because the record is not before them. 2. The justices of gaol-delivery cannot make out process returnable before the justices of the peace, because another court. 3. By some opinions the justices of gaol-delivery may make out process to the outlawry returnable at the next sessions of gaol-delivery; but others thought they had no such power, for their commission is to deliver the gaol, and not to issue process against them that are out of gaol, neither can they proceed to outlawry before themselves, as commissioners of *oyer and terminer*, because the indictment was taken before other justices, *viz.* of the peace: It was therefore held the entire record must be removed into the king's bench by *certiorari*, and from thence process [38] of outlawry may go against *B.* T. 11 Car. B. R. 2 Rol. Abr. 96. *Storie's* case, who in this case was outlawed before the justices of peace, and the outlawry therefore reversed.

21. By the statute of 26 H. 8. cap. 6. The justices of peace and gaol-delivery in the counties adjacent to *Wales* have power to hear and determine counterfeiting, washing, or clipping of coin, murder, burnings of houses, manslaughter, robbery, burglary, rapes, and other felonies, and the accessories thereof committed in *Wales*, or any lordship marcher, &c. as if committed in the same adjacent county: This is repealed as to treasons by the statute of 1 & 2 P. & M. cap. 10. but stands in force as to other felonies.

22. By the statute of 27 H. 8. cap. 24. The power of making justices of *eyre*, of assise, gaol-delivery, and of the peace in counties palatine and franchises is resumed, and the same are to be made by letters patents under the great seal of *England*.

But they shall hold their sessions only within such franchises and liberties, and in none other places, as the justices of the said liberties lately have commonly used within the said liberties;

and that no person within the said liberties be compellible by authority of this act to appear out of the same before other justices of assise, gaol-delivery, or of the peace, than those named by the king to sit within the said liberties.

By this statute, 1. These justices sitting within exempt franchises or counties palatine are now the king's courts and the king's justices, and therefore a *certiorari* issuing out of the king's bench to these justices sitting in *Durham* or the *cinque-ports* ought to be obeyed as by other justices out of franchises.

2. That yet where franchises of this nature were antiently granted to abbots to make justices of gaol-delivery to sit within franchises, as for instance in the franchise of *St. Edmunds-Bury*, there is a special commission of gaol-delivery for that franchise. 3. That this restriction of sitting within the franchise extends not to the commission of *oyer* and *terminer*, for that

[39] extends *tam infra libertates, quàm extra*, and therefore may sit out of a franchise, and determine misdemeanors within the franchise: And this I did once in a session in the county of *Suffolk*, which by reason of sickness at that time, could not be held in *Bury*, viz. I kept the session for the whole county by virtue of the commission of *oyer* and *terminer*. 4. This resumption extends not to cities and boroughs, but they are specially excepted, and particular provision for the bishops of *Ely*, *Durham* and *York*, to be justices of the peace only within their franchise.

23. By the statute of 6 R. 2. cap. 5. they are to hold their sessions in the principal towns, where the county-court is held; but this is but directive not coercive, for the judges may, and usually have appointed their sessions at their pleasure in other places.

CHAPTER VI.

TOUCHING THE POWER OF JUSTICES OF ASSISE AND NISI PRIUS,
WITH RELATION TO FELONY.

THE settled course of granting *nisi prius* was by the statute of 27 E. 1. *de finibus*, cap. 9.

By the construction made of that statute, if a man be indicted in the country, and that indictment removed by *certiorari*, and the body of the prisoner by *habeas corpus* into the king's bench, and there he pleads *not guilty*, after that statute and before the statute of 6 H. 8. cap. 6. the transcript of the record might be

sent down by *nisi prius* to try that issue. 22 E. 4. 19. 5 Mar. B. Coron. 231. Statute 42 E. 3. cap. 11. 4 Co. Rep. 43. b. *Bi-bith's* case.

And the like may be done in an appeal, 21 H. 7. 34. a. 2 & 3 P. & M. *Read's* case, Dy. 120. a. *Rast. Entries* in title *Appeal per totum*, 8 H. 5. 6. Coron. 463.

Upon the statute, of 27 E. 1. cap. 3. and the statute of 14 H. 6. cap. 1. there hath been variety of opinions [40] touching their power in cases of felony: Some have thought, that by virtue of those statutes they had originally a power to hear and determine felonies without any other commission, the as to treason concerning coin, upon the statute of 3 H. 5. cap. 7. it is expresly directed, that they shall have a commission for the hearing and determining that offense; thus *Stamf. Lib. II. cap. 5. f. 57 & 58.* Again, others have thought, that they have not any such original power without a special commission enabling them to hear and determine felonies originally; but that commission, as it seems by the statute of 27 E. 1. cap. 3. is called a *writ*, but is in truth no other than a commission, for all associations are commissions; and then the naming of them justices of *nisi prius* is nothing else but the description of those persons, to whom commissions of gaol-delivery shall be directed, and so they are no other but justices of gaol-delivery.

Others have thought, and that truly, that the justices of *nisi prius* have not any original power of hearing and determining indictments of felony without a special commission for that purpose, but that by virtue of the acts of 27 E. 1. and 14. H. 6. they have a power to determine such felonies only, as are sent down to trial before them; as they have power by the statute of *Westm. 2.(a)* to give judgment in assises of *darrein presentment* and *quare impedit*, where an issue is brought down to trial before them, tho they have no power originally to hold plea in a *quare impedit*.

And that this was the meaning of the statute of 14 H. 6. cap. 1. and tho it speaks of all cases of felony and of treason, yet it is intended only of such felonies or treasons as were at issue and brought down before them to be tried by *nisi prius*, appears in this, that as to those points of treason, which were enacted by 3 H. 5. cap. 7. it is expresly enacted by that statute, that they shall have commissions to hear and determine them, and so as to those they needed not the aid of a new statute to enable it.

Now as to the usage thereupon.

1. In case of appeals. If issue be joined and sent down by *nisi prius* to be tried, antiently indeed they [41]

did not proceed to judgment; but if the defendant were acquitted, they did by the same jury inquire, 1. Of the damages. 2. Of the sufficiency of the plaintiff. 3. Of the abettors; and this inquest being returned into the king's bench, there judgment and execution were made, *quod vide* 8 H. 5. 6. *Coron.* 463. yea and by *Fairfax*, 22 E. 4. 19. If the plaintiff were nonsuit at the *nisi prius*, the justices of *nisi prius* should only record it, and remit the record into the king's bench, and not arraign the prisoner at the king's suit.

But the later practice and authority is otherwise, *viz.* That they may not only inquire of the abettors, but also give judgment against them; and, if the plaintiff be nonsuit, may arraign the prisoner at the king's suit, and give judgment and make execution. *Dy.* 120. *a. Read's case.* And so if he be convict of manslaughter upon an appeal, the justices of *nisi prius* allow his clergy, 4 *Co. Rep.* 43. *b. Bibith's case;* and this it seems is warranted by the construction of the statute of 14 H. 6. *cap.* 1. for the statute of *Westm.* 2. *cap.* 12. (*b*) extends not to this case, especially of arraigning the prisoner upon a nonsuit.

2. As to an indictment of felony or treason removed out of the county by *certiorari*, and the party pleading, the record is sent down by *nisi prius* to be tried, the judges of *nisi prius* may upon that record proceed to trial, and judgment, and execution, as if they were justices of gaol-delivery by virtue of the statute of 14 H. 6. *cap.* 1.

But if there were any question upon that statute, yet the statute of 6 H. 8. *cap.* 6. which extends to all justices and commissioners as well as those of gaol-delivery and of the peace, enables the court of king's bench to send to them the very record itself, and by special writ or mandate to command them to proceed to trial and judgment upon such issue joined; as they may command the justices, before whom the indictment was taken, to proceed to hear and determine the same if no such issue were joined.

CHAPTER VII.

CONCERNING THE COMMISSION OF PEACE, AND THE POWER THEREOF, IN RELATION TO FELONIES.

AT common law there were conservators of the peace assigned by the king by commission.[1]

But the first establishment of justices of the peace was by the statute of 1 E. 3. *cap.* 16. Good and lawful men shall be assigned in every county to keep the peace.[2]

[1] At common law justices of the peace, then called *conservators* of the peace, were, 1. *Virtute officii*, as the King, the Lord Chancellor, or Lord Keeper, the Lord Steward, the Lord Marshal and Constable of England, and every Justice of King's Bench, having general jurisdiction over the whole kingdom: the Justices of the Common Pleas, the Barons of the Exchequer and various minor judicial officers, having jurisdiction within special places only, and mere limited powers. 2. *By tenure of land*, as if the King granted unto a man lands to hold of him by knight's service and to be a conservator of the peace in the county, he is a conservator by tenure. 3. *By election*, in the full county before the sheriff. *Lambard Book 1. chap. 3.*

The first assumption by the crown of this right of the people, the appointment of justices of the peace instead of their election, was in the beginning of the reign of Edw. III., and the writ for this purpose containeth, says Lambard, a *sayre* sheweth of a fowle shift, I mean his attaining to the crowne by the deprivation of his owne father—after such time as Queen Isabel, contending with her husband King Edward the Second, was returned over the seas into England, accompanied with her son prince Edward, called afterward the third king of that name, and with Sir Roger Mortimer and such others of the English nobility as had for the indignation of the king fled over the seas unto her: she soon after got into her hands the person of the old king, partly by the assistance of the Henalders that she brought with her, and partly by the aid of such other her friends as she found ready here: and she immediately caused him, by forced patience, to surrender his crown to the young prince. And then also, forasmuch as it was, not without cause, feared that some attempt would be made to rescue the imprisoned king, order was taken that he would be conveyed secretly and by night watches, from house to house and from castle to castle, to the end that his favourers should be ignorant what was become of him: yea and then withal it was ordained by parliament in the lifetime of that deposed king, and in the very first entry of his son's reign, 1 Edw. III. ch. 15, that in every shire of the realm good men and lawful, which were no maintainers of evil nor barretors in the country, should be assigned to keep the peace: which was as much to say that in every shire the king himself should place special eyes and watches over the common people, that should be both willing and wise to foresee and be also enabled with meet authority to repress all intention of uproar and force even in the first seed thereof and before that it should grow up to any offer of danger. So that for this cause, as I think, the election of the simple conservators or wardens of the peace was first taken from the people and translated to the assignment of the king. *Lambard Book 1. chap. 4.*

In the more recently made or amended Constitutions of the American States the common law has been restored in this respect and justices of the peace are now elected by the people.

[2] The appellation "*justice*" is usually applied to persons in the commission of the peace, for counties, &c.; "*magistrate*" to persons exercising similar authority under charter, as in cities, boroughs, &c. 3 *Burn's Justice*, 984. *Edit.* 1843.

And by the statute of 18 E. 3. *cap.* 2. Two or three of the best reputation in the counties, with other wise and learned in the law, shall be assigned by the king's commission to hear and determine felonies and trespasses done against the peace in the same counties, and inflict punishment reasonably according to law and reason, and the manner of the deed; and this statute directed their power of hearing and determining as well as keeping the peace.[3]

In pursuance of these statutes, and of other statutes^(a) relative to justices of peace, they have a commission of the peace under the great seal directed to them.[4]

And this commission consisted antiently of three clauses of *Assignavimus*, and now of two.

The first is, *Assignavimus vos conjunctim & divisim & quemlibet vestrum ad pacem nostram in com' Cant' conservandam, &c.* And this makes every of them conservators and justices of the peace for those acts that are performable by one justice.

The second is, *Assignavimus vos & quoslibet duos vel plures vestrum, quorum aliquem vestrum A. B. C. &c. unum esse volumus, justiciarios nostros ad inquirendum per sacramentum proborum & legalium hominum de comitatu prædicto,*

[43] *per quos rei veritas melius sciri poterit, de omnibus & omnimodis felonis, veneficiis, incantationibus, arte magicâ, fortilegiis, transgressionibus, forestaliis, regratariis, ingrossariis, extortionibus quibuscunque: Ac de omnibus & singulis aliis malefactis & offensis, de quibus justiciarii pacis nostræ legitime inquirere possunt aut debent, per quoscunque & qualitercunque in comitatu prædicto factis & perpetratis, vel quæ in posterum ibidem fieri contigerit; and then goes to some particular offenses, and to inspect indictments taken before*

(a) 34 E. 3. *cap.* 1. 2 H. 5. *cap.* 1.

[3] Justices of the peace have as well the antient power touching the peace, which the conservators of the peace had at common law, as also that whole authority which the statutes have since added thereto. *Dalt. ch. 5. p. 15.*

[4] The first commission was issued about the year 1337; it was after refined by conference of the judges and barons A. D. 1590, (*Lamb. ch. 9.*) and continues much the same to this day. See *Form in 3d vol. of Burn's Justice, edition of 1845.*

By stat. 18 Geo. II. ch. 20, a freehold qualification of the clear yearly value of a hundred pounds is required.

By stat. 5 & 6 Will. IV. ch. 76, § 101, justices appointed for boroughs within the municipal corporations act, are not required to have any qualification by estate.

Justices by commission hold during the pleasure of the crown. *Dalt. ch. 3.* Justices of the peace that were so at common law, *virtute officii*, still continue. 1 *Black. Comms.* 349.

them or before former justices of the peace, and to make process against persons indicted, quousque capiantur, reddant se, vel utlagentur: Ac omnia & singula felonias &c. & cætera præmissa secundum legem & consuetudinem regni nostri Angliæ audiendum & terminandum, and to do execution thereupon.

A proviso if a case of difficulty arise, then to respite judgment till the justices of assise come into the county, &c.

So that the commission gives a personal power to every justice of peace by the first clause; but by the second gives to them, or two of them, whereof one of the *quorum*, power to hear and determine felonies, &c.[5]

But besides these powers specially given them by their commission, and the general acts of parliament touching justices of peace, there are divers subsequent statutes, that give them powers, sometimes to one justice, sometimes to two, sometimes in their sessions, sometimes out of their sessions, which it were too long here to recite; I shall only apply myself to that power, that they have by their commission or otherwise, in relation to treasons, felonies, and capital offenses.

I. And in the first place touching the second *Assignavimus*, whereby they have power to hear and determine:

Without this clause they have no power to hear and deter-

[5] In the clause of the commission directing inquiry as to felonies, some particular justices, or one of them, are directed always to be included, and no business to be done without their presence; the words of the commission running, *quorum aliquem vestrum A. B. C. &c. unum esse volumus*; whence the persons so named are usually called justices of the quorum. And formerly it was customary to appoint only a select number eminent for their skill and discretion to be of the quorum; but now the practice is to advance almost all of them to that dignity, naming them all over again in the quorum clause, except perhaps some one inconsiderable person for the sake of propriety. 1 *Black. Comm.* 351; see, 4 *Geo. IV. ch. 27.*

An authority given to two cannot be executed by one. *Dalt. ch. 6. 4 Reps. 46.* But by the 3 *Geo. IV. ch. 23. s. 2.* one justice of the peace may receive the original information or complaint as to an offence where two or more justices are empowered to hear and determine.

And independently of this enactment, it has been considered that when justices act ministerially, it is not necessary, even in cases where two only have jurisdiction, that they should meet together to do the act; and long practice seems to allow this. Thus, when a statute appointeth a thing to be done by two justices or more, if the offence be any misdemeanor or matter against the peace, then, upon complaint made to any of those justices, it seemeth that one of them may grant out his warrant to attach the offender and to bring him before the same justice and the other justice so appointed, at some convenient place, and then they are to hear and determine the same. *Dalt. ch. 6. 3 Burn 1008. edit. 1845.* When they are to do a judicial act they should be both together, to hear the evidence and consult together at the time when they give judgment. *Billings v. Prian, 2 Bla. Reps. 1017; Battye v. Gresley, 8 East, 319; R. v. Forrest, 3 T. R. 38.*

mine felonies or other matters, for the bare making of them justices of peace without this clause doth not give them power to hear and determine indictments: *vide Stamf. P.C. Lib. II. cap. 5. f. 58. a.* And therefore in all returns of making up of records before justices of peace touching indictments or convictions, they must be mentiond to be justices of

[44] peace, *nec non ad diversa felonias, transgressiones, & alia malefacta in eodem comitatu perpetrata audiendum & terminandum assignat'.*

Yet this clause doth not make them justices of *oyer and terminer*, for *that* is a distinct commission of another nature, as hath been shewn; and therefore those acts of parliament, that create new offenses and limit them to be heard and determind before justices of *oyer and terminer* only, give not thereby power to the justices of peace in such cases, unless also named in the act of parliament.

As the statute of 5 *Eliz. cap. 14.* of forgery, [6] 3 *H. 7. cap. 13.* conspiring the king's death, 33 *H. 8. cap. 12.* murder in the king's palace, 8 *H. 6. cap. 12.* embezzeling records, 33 *H. 6. cap. 1.* embezzeling master's goods, 2 & 3 *E. 6. cap. 24.* stroke in one county and death in another, accessory in one county to a felony in another; for these statutes limit the punishment of these offenses to special judges appointed by the acts themselves, or to justices of *oyer and terminer*, under which appellation generally, in statutes, justices of peace come not. 9 *Ca. Rep.* 118. *b. Co. P. C. cap. 41. p. 103. Dalt. cap. 20.*

As touching high treason it is not mentiond in their commission, and they have no power to hear and determine it by the general words of their commission.

But a justice of peace upon complaint of a treason, may examine and commit the offender to prison, and take informations touching it, for it is breach of the peace, and in order to the

[6] In 3 *Hawk. P. C. 7th edit. c. 8. § 64.* it is said "that it hath been of late settled that justices of the peace have no jurisdiction over *forgery* and *perjury* at the common law," and the author then assigns as a reason, "that inasmuch as the chief end of the institution of the office of these justices was for the preservation of the peace against personal wrongs and open violence, and the word 'trespass' in its popular and natural sense, is taken for such kind of injuries, it shall be understood in that sense only in the said statute and commission, or at the most to extend to such other offences only as have a direct and immediate tendency to cause such breaches of the peace, as libels, and such like, which, on this account, have been adjudged indictable before justices of the peace."

It seems, therefore, that justices cannot commit for the offence of perjury or forgery at common law; and see *R. v. Bartlett*, 3 *Dowl. N. S.* 95; 12 *L. J. (N. S.) M. C.* 127 *S. C.* There is, however, statutable perjury under the 5 *Eliz. c. 9.* for which justices may commit. *Ib.* 1 *Burr.* 774. 29th edit.

conservation thereof, he may commit the offender to gaol, in order to farther proceeding against him by justices of *oyer and terminer* or gaol-delivery.

But by some acts of parliament justices of peace may take indictments of particular treasons, but those presentments they must certify into the king's bench or gaol-delivery, as the case shall require, as upon the statute of 5 *Eliz. cap. 1.* for maintaining the authority of the see of *Rome*, 13 *Eliz. cap. 2.* for bringing in bulls for absolution, *Agnus Dei*, &c. 23 *Eliz. cap. 1.* for withdrawing and reconciling, or being withdrawn from the king's allegiance.

By the statute of 3 *H. 5. cap. 7.* as to treason for clipping, &c. power was given to the justices of peace [45] to inquire and make process thereupon, and antiently that clause was put into their commission, but now omitted; for by the statute of 1 *Mar. cap. 1.* the act of 3 *H. 5. cap. 6.* is repealed, and consequently the act of 3 *H. 5. cap. 7.* that gave power to justices of peace to inquire touching it.

By the statute of 24 *H. 8. cap. 6.* power is given to justices of peace to the adjacent counties to hear and determine counterfeiting and clipping of coin, and murders and other felonies in *Wales*; but this also as to treasons is repealed by the statute of 1 & 2 *P. & M. cap. 10.*

As touching felonies.

It is true, that by the antient statute of 6 *E. 1. cap. 9.* and 4 *E. 3. cap. 2.* murders and manslaughterers were to stay till the gaol-delivery.

But by the statutes of 18 *E. 3. cap. 2.* 34 *E. 3. cap. 1.* 17 *R. 2. cap. 10.* tho they do only mention felonies, and do not expressly mention murders and manslaughterers, and although the commission of the peace mentions not murders by express name but only felonies generally, yet by these general words in these statutes, and this commission, they have power to hear and determine murders or manslaughterers, and thus it has been resolved 5 *E. 6. Dy. 69. a. Pref. to 10 Co. Rep.* against the opinion of *Fitzherbert* in his *Justice of Peace*, and 9 *H. 4. 24. Coron. 457.*

For till the statute of 13 *R. 2. cap. 1.* a general pardon of all felonies had pardoned murder; and tho that statute require the word *murder* to be expressed, yet that is with relation only to pardons, and not to restrain the extent of the word *felonies* in a commission.

And therefore I know not what my lord *Coke* means in his comment upon the statute of *Gloucester. cap. 9. 2 Instit. p. 316.* where he saith, *that justices of peace cannot take an indictment of the killing of a man se defendendo, because not*

within their commission, but justices of gaol-delivery may; if justices of peace have a power to hear and determine murder or manslaughter, it seems they may take an indictment of *se defendendo*, for the coroner may take an indictment of *se defendendo*. 3 E. 3. Coron. 286. Co. Entries 354. a. Crompt. Justice 28. a. Holme's case, and so may justices of peace against the opinion of Stamford, f. 15. b. But tho the justices have this power, yet they do not ordinarily proceed to the hearing and determining of murder or manslaughter, and rarely of other offenses without clergy, and the reasons are,

1. The monition and clause in their commission in cases of difficulty to expect the presence of the justices of assise.

2. The direction of the statute of 1 & 2 P. & M. cap. 13. which directs justices of peace in case of manslaughter and other felonies to take the examination of the prisoner and the information of the fact, and put the same in writing; and then to bail the prisoner, if there be cause, and to certify the same with the bail at the next gaol-delivery; and therefore in cases of great moment, they bind over the prosecutors, and bail the party, if bailable, to the next gaol-delivery; but in smaller matters, as petit larceny and some cases within clergy, they bind over to the sessions, vide Dalt. cap. 20; but this is but in point of discretion and convenience, not because they have not jurisdiction of the crime.

By force of this commission they may take an inquisition touching *felo de se*, if not inquired before by the coroners; and tho the coroner's inquisition is to be *super visum corporis*, this needs not, but it is traversable. Co. P. C. p. 55.

They may proceed upon an indictment taken before former justices of the peace in the county by the statute of 11 H. 6. cap. 6. and 1 E. 6. cap. 7. but cannot proceed upon an indictment taken before commissioners of *oyer* and *terminer* or gaol-delivery. Lamb. Justic. p. 551.

But if an indictment be taken before the sheriff in his Turn by the statute of 1 E. 4. cap. 2. those indictments are to be delivered to the justices of peace at their next session, and they may proceed upon those presentments.

Tho they have power to hear and determine felonies, yet,

1. They cannot deliver a person by proclamation, (as justices of gaol-delivery may,) till an inquisition taken; but if [47] an inquisition be taken and an *ignoramus* found, they may deliver him, as it seemeth, Crompt. de Pace, f. 9. b.

2. They cannot assign a coroner to an approver.

Tho this be not a commission of *oyer* and *terminer*, yet by the opinion B. Commission 8. a commission of *oyer* and *ter-*

miner in the county determines the second *Assignavimus* of the commission of the peace *ad audiendum & terminandum; quod querere*.

A general commission of the peace in a county, in two cases, doth not determine the power of former justices of peace: 1. Where they are justices by charter, such as are in *London, Norwich, &c.* for these are perpetual and not amoveable: 2. Justices in a particular city or corporation, parcel of a county, by commission are not superseded by a new commission granted for the whole county by the statute of 2 & 3 *P. & M. cap. 18. Vide statute 11 H. 6. cap. 6.*

If the king by charter grant to a corporation, that the mayor and recorder shall be justices of peace within the city, whereby they are justices in perpetuity by charter, yet if there be no words of exclusion, the justices of peace of the county have a concurrent jurisdiction with the justices by charter, and so it is, if they be justices by commission in the town or city: Or the king, notwithstanding that charter, may grant a commission of the peace specially in that city or county, and they will have a concurrent jurisdiction with the justices by charter.[7]

But if this franchise of being justices be granted, *ita quod justiciarii comitatûs se non intromittant*, then, tho a subsequent commission be granted in the county at large, it seems they have no jurisdiction in this corporation or town. 20 *H. 7, 8. Case de Abbé de St. Albans; querit tamen*, whether the indictment or session in the franchise be void or only a contempt in the justices: This was heretofore moved between the justices of the peace of *Surrey* and the borough of *Southwark*, but never resolved; but some thought it to be like the case of the bailiwick of a liberty and *retorna brevium* granted, *ita quod vicecomes non intret*, if the sheriff executes a writ within the liberty, the execution is good, but the sheriff [48] punishable for infringing the franchise.

By the statute of 4 *E. 3. cap. 2.* the justices of the peace

[7] Justices of the peace for the county have concurrent jurisdiction in such boroughs and towns corporate as are not counties of themselves, *Crompt. 8.* though they have a magistracy of their own, unless the charter by which they are constituted imports an express exclusion of the county justices, by a non intromittant clause, *R. v. Sainsbury*, 4 *T. R.* 451; and they have such jurisdiction though the charter contains such clause, if the borough or town corporate has no separate court of Quarter Sessions, 5 & 6 *Will. IV. c. 76. s. 111.* They have no such jurisdiction, if there be no such sessions and the charter contains such clause. 3 *Burn* 1004. *Edic.* 1845.

A mayor is not a justice of the peace without a particular grant in the charter. *R. v. Langley*, 2 *Ld. Raym.* 1030.

If the charter of a city gives to the justices exclusive jurisdiction, the justices for the county cannot interfere. *Talbot v. Hubble*, *Str.* 1154.

ought to deliver all their presentments to the next session of gaol-delivery, where they shall be finally heard and determined.

It is true the justices of peace may so deliver them over, and if they deliver them so over, the justices of gaol-delivery may proceed to determine them, as well as upon the coroner's inquest, namely if the offender be in gaol, but otherwise not.

But this delivery over of the presentments at the session is neither usual nor necessary at this day, for that statute was made when the justices of peace had only power to inquire, and not to determine.

But by the statute of 18 *E. 3. cap. 2.* their commissions were to hear and determine, and so were all the commissions of the peace made after that statute, so that after that statute, they might, if they pleased, determine the presentments taken before themselves.

The commissioners of *oyer* and *terminer* may indict and try at the same session, yet (as before) it hath been ruled otherwise in case of justices of peace, unless by consent. But certainly constant usage and learned opinion must give that exposition upon those resolutions, that it must extend only to popular actions or indictments for misdemeanors, and not in cases of felony, for here they may and do proceed *de die in diem* and at the same sessions, and so much is intimated in *Bumpsted's case*, *H. 11 Car. 1. (d) supra, cap. 4. p. 28.* and *Coke 4 Instit. cap. 28. p. 164.* expressly saith it is common experience, and reason speaks for it, as well as in the case of the commission of *oyer* and *terminer*, the session being in the same county, and with a public summons preceding every general sessions.

The ordinary course of proceeding is in their sessions, which are of two kinds, *viz.* private sessions, or public. Touching the former I shall say nothing, for it is ordinarily for the dispatch of country business, or about ale-houses, poor, &c.

The public sessions are of two kinds, *viz.* the general [49] quarter-sessions, and general sessions that are not quarter-sessions; both are or should be summoned by a precept in the king's name; *quod vide Crompt. Justice, 232. a.* or of the justices. *Lamb. Lib. IV. cap. 2.*

As to the jurisdiction in general both agree, that in either of these general sessions of the peace they may proceed touching those matters that are within their commission, as to take indictments, try felons, &c.

But by particular acts of parliament some things are limited to the quarter-sessions, and cannot be proceeded in at other general sessions, as 5 & 6 *E. 6. cap. 14.* for ingrossing, 1 *H. 7.*

cap. 7. hunting, 2 & 3 *P. & M.* *cap.* 8. highways, 5 *Eliz.* *cap.* 9. perjury, 5 *Eliz.* *cap.* 12. licensing badgers, 7 *E.* 6. *cap.* 5. wines, and divers others, *de quibus vide Lamb. Lib. IV. cap.* 19.

These quarter-sessions were by several acts of parliament appointed to be held at several times; by 25 *E.* 3. *cap.* 8. at the *Annunciation*, *St. Margaret*, *St. Michael*, and *St. Nicholas*.

By 36 *E.* 3. *cap.* 12. within the *utis* of *Epiphany*, within the week of *Lent*, between *Pentecost* and *Midsummer*, within eight days of *St. Michael*.

By 12 *R.* 2. *cap.* 10. the sessions are set at liberty, *viz.* to be held every quarter of the year at least; only *Middlesex* is excepted by 14 *H.* 6. *cap.* 4.

By the statute of 2 *H.* 5. *cap.* 4. in the first week after *St. Michael*, *Epiphany*, clause of *Easter*, and translation of *St. Thomas* the martyr.

By the statute of 33 *H.* 8. *cap.* 10. the *Tuesday* after *Easter* week is expounded to be in the week after *Clausum Paschæ*, for the sessions to be held; yet *Clausum Paschæ*, or *Low-Sunday* is the first day of that week.

The strict regular exposition of the statute of 2 *H.* 5. for the week after *Michaelmas*, &c. is, that if *Michaelmas* fall upon the *Sunday* or *Monday*, the quarter-sessions in strictness should be held in the ensuing week, and not the same week.

Yet it is very plain, that the quarter-sessions are variously held in several counties, some at one day, [50] some at another, yet it hath been ruled; that these are each of them good quarter-sessions within the several acts that relate to quarter-sessions; for these acts, especially that of 2 *H.* 5. is only directive and in the affirmative, and therefore, tho the sessions are held at another day according to the general direction of the statute of 12 *R.* 2. yet they are quarter-sessions.

Nay in *Middlesex*, where by the statute of 14 *H.* 6. there are regularly but two sessions, yet they may hold quarter-sessions (as indeed they do,) in that county: tho these sessions are not precisely held at the times prefixed by 2 *H.* 5. yet they are quarter-sessions if held quarterly; and so it was agreed by the justices upon a late act^(e) this session of parliament for the taking and subscribing the oaths of supremacy.

H. I shall now proceed to some few observations touching the power of particular justices of peace by virtue of their first *Assignavimus* in the commission, which makes every par-

(e) 25 *Car.* 2. *cap.* 2.

ticular justice a justice of peace, and gives him power to conserve the peace.[8]

[8] Justices of the peace whose existence as a part of the judiciary, is provided in most of the constitutions of the United States derive their powers as "conservators of the peace" from the common law more or less extended or restrained in the different States by statutory enactment. In *Massachusetts* Mr. Justice Sewall says "The office of justice of the peace was introduced by our forefathers at their migration; and in all particulars then applicable or which have since become applicable to this jurisdiction may be considered as possessing here the general character and functions allowed to it in England by force of the statutes which had there created and regulated this ancient and important office. The statutes since enacted, have enumerated the powers and duties of justices of the peace, both in civil and criminal matters; so that now there is little if any occasion to recur to the English statutes for the powers of this office, and perhaps the enumeration itself precludes such recurrence. The office therefore, exists here principally if not entirely according to our statutes." *Com. v. Foster*, 1 *Mass. Rep.* 489. In *Pennsylvania* the power of a justice of the peace in criminal matters as at common law is almost untouched by statute. In *Arkansas* the constitution of the State provides that "Justices of the peace shall in no case have jurisdiction to try and determine any criminal case or penal offence against statute, but may sit as examining courts; and commit, discharge or recognise, to the court having jurisdiction, for further trial, offenders against the peace. For the foregoing purposes they shall have power to issue all necessary process. They shall also have power to bind to keep the peace or for good behaviour." And by statute, power is given them, "to cause to be kept all laws made for the preservation of the public peace," &c. In *New York*, it is said that their duty and authority are derived in some degree from the common law; but they depend principally upon the several statutes which have created objects of their jurisdiction, defined their powers or imposed duties upon them. *Barbour's Crim. Treatise*, 437.

The thirty-third section of the judiciary act of the United States, *Sess.* 1, c. 20, 1789, confers on *Justices of the Peace* or other magistrates of any of the United States power to arrest, imprison or bail, for crimes or offences against the United States, according to the mode of process of the State where such offender against the United States laws may be found.

When a magistrate acts in his office with a partial, malicious or corrupt motive he is guilty of a misdemeanor and may be proceeded against by indictment or criminal information in the King's Bench, which exercises a general supervision over all justices of the peace. *R. v. Cozens*, 2 *Doug.* 426. But they will never be punished criminally for a mere error in judgment nor in any case unless they appear to have acted from an oppressive, dishonest or corrupt motive, under which fear or favor are included. In *re Fentiman*, 4 *Nev. & M.* 128; 1 *Ad. & El.* 187. Justices are also liable civilly, when they act ministerially; but the party shall not have both remedies, and before the court will grant an information they will require the relinquishment of the civil action, if such has been begun: and even where an indictment has actually been found, the attorney general will grant a *noli prosecute*, if it appear that the prosecutor is determined to carry on a civil action at the same time. *R. v. Fielding*, 2 *Burr.* 719. When a justice of the peace in or out of sessions has jurisdiction and acts judicially he is not liable to an action, however erroneous the conclusion at which he arrives or corrupt his motives in coming to it; in such case the only remedy is by information. 2 *Hawk. ch.* 13; *Ackerly v. Parkinson*, 3 *M. & S.* 425; *Bassett v. Goodecall*, 3 *Wils.* 121; *Griffiths v. Harris*, 2 *M. & W.* 835; *Wilkins v. Hemsworth*, 3 *N. & P.* 55; *Garnett v. Ferrand*, 6 *B. & C.* 611; *State v. Campbell*, 2 *Tyler*, 177; *Ambler v. Church*, 1 *Root*, 211; *Reid v. Hood*, 2 *Not. & McCord*, 168; *Holcomb v. Cornish*, 6 *Conn.* 375; *State v. Porter*, *Conn. Const. Reps.* 694; *Lining v. Bentham*, 2 *Bay.* 1; *Gregory v. Brown*, 4 *Bibb.* 28; *Walker v. Floyd*, *ib.* 237. When a criminal information is applied for against magistrates, the question for

Concerning their power to bail or commit persons brought before them for felony *vide infra in capite de bail & mainprise, (f) & nota statute. 34 E. 3. cap. 1. & alia statuta.*

(f) cap. 15.

the court is not whether their acts be found upon investigation to be strictly right or not, but whether they were influenced by corrupt, oppressive or partial motives; or acted in error and from mistake only. In the latter case the court will not grant the rule. *R. v. Badger, 12 Law, J. N. S. M. C. 66; 7 Jur. 216, Q. B.* See *R. v. Arrowsmith, 3 Dougl. N. S. 704; ex parte Beauclerk, 7 Jur. 373; ex parte Lee, ib. 441; ex parte Marlborough, 1 New Sess. Cas. 195; 13 Law J. N. S. 105; R. v. Harris, ib. 169.* But he is liable to an action for exercising authority where he has none. *Ely v. Thompson, 3 A. K. Marsh, 70.* An information was granted against a justice for not actively assisting in suppressing a riot; the law requires from a justice an active conduct in suppressing riots; and if he finds persons riotously assembled, he may not only arrest offenders, but authorise others to arrest them by a bare verbal command without other warrant. *Respub. v. Montgomery, 1 Yeates, 419.*

The jurisdiction of a justice of the peace is limited; and when that is exceeded, responsibility attaches and every thing done is void; and this whether such want of jurisdiction apply to the subject matter or the person. *Wise v. Withers, 3 Orzech, 331; Hall v. Rogers, 2 Blackf. 429.* If a justice issues a warrant contrary to the provisions of the constitution, or in a matter over which he has no jurisdiction and the party is arrested the justice is answerable in an action of trespass. *Johnson v. Tompkins, Baldwin's Reps. 588.*

A conviction and judgment for felony against a justice of the peace is a forfeiture of his office; nor does a pardon restore his capacity. *Fregate's case, 2 Leigh, 724.*

Whenever a new power is conferred on a justice, he must proceed in the mode prescribed by the statute. *Bigelow v. Stearns, 19 Johns. 36; State v. Barrow, 3 Murphy, 121.* Any general authority by justices to constables to fill up or alter process would be void and highly improper. *Pierce v. Hubbard, 18 Johns. 405.* Acts done by a justice in a judicial capacity who was not duly qualified are not absolutely void. *Margate Co. v. Hannan, 8 B. & A. 266.* In judicial acts by justices all things shall be intended regular till the contrary appear: *aliter* of ministerial acts, for there all must appear to be right. *R. v. Venables, 8 Mod. 378.*

A magistrate has, it seems, a power to commit a person guilty of a contempt, by insulting him, or otherwise when acting in his judicial capacity, though not so when he is acting only ministerially. *R. v. Revel, 1 Stra. 421; Burdett v. Abbott, 14 East, 85; Pettit v. Addington, Peake, 62; R. v. James, 5 B. & Ald. 894; S. C. 1 D. & R. 559; Cropper v. Horton, 8 D. & R. 166.*

The power of justices of the peace to commit for contempts and its extent is in many of the United States subject of statutory provision. And see *Lining v. Bentham, 2 Bay. 1; State v. Johnson, ib. 385; Filer v. Probasco, 2 Browns (Penns.) 137; Brooker v. Com. 12 Sergt. & Rawle, 175; Edmondson v. Freen, 3 Hill, 410.*

It is clear that magistrates ought not to exercise their functions in their own case, but cause the offenders to be convened or carried before other justices, or desire the aid of some other justice being present. *Dalt. ch. 173.* Yet in some cases even if the justice shall act in his own cause, it seemeth to be justifiable; as when a justice shall be assaulted, or (in the doing his office especially) shall be abused to his face, and no other justice present with him; then it seems he may commit such offender, until he shall find sureties for the peace or good behaviour, as the case shall require: but if any other justice were present, it were fitting to desire his aid. *Dalt. ch. 173. R. v. Revel, 1 Strange, 429.*

The execution of the powers confided to justices of the peace in summary con-

They are to execute their authority as justices of peace within the county wherein they are justices.

If a justice of peace lives or be out of the county,[9] wherein he is justice, he cannot by his warrant fetch a person out of the county, where he is justice, to come before him in the county, where he is; 13 E. 4. 8. b. *Plowd. Com.* 37. a. *Platt's case*.

He cannot do a judicial act out of the county wherein he is a justice of peace,[10] as take recognizances, take examinations, commit offenders, &c. but he may do a ministerial act, as to examine a party robbed, whether he knows the felons according to the statute of 27 Eliz. cap. 13. H. 6. Car. 1. B. R. *Helier's case*, *Croke*, p. 211, 212. yet *quære* of recognizances and examinations, for they are acts of voluntary jurisdiction; and therefore it seems may be done out of the county, as well as a bishop may grant administration, institution, or orders out of his diocese.[11] But indeed imprisoning of a person for not giving recognizance, or committing a person for a crime, are acts of compulsory jurisdiction, and may not be exercised out of his county.(g)

Yet suppose a man be a justice of peace in London and in

(g) By 9 Geo. 1. cap. 7. §. 3. "If a justice happens to dwell in any city or other precinct, that is a county of itself, situate within the county at large, for which he shall be appointed a justice, tho' not within the said county, he may grant warrants, take examinations, and make orders for any matters, which any one justice may act in at his dwell-house, tho' out of the county whereof he is appointed a justice, and in some city or precinct adjoining, that is a county of itself; provided, that no power is thereby given to the justices for the county at large to hold their sessions in cities or towns, that are counties of themselves, nor to justices, sheriffs, constables, or other peace-officers of the county at large to act or intermeddle in any matters arising within such cities or towns, otherwise than as if the said act had never been made."

victions are generally watched by the courts with jealousy, such summary convictions being derogatory to the liberty of the subject; and all powers given in restraint of liberty must be strictly pursued. *Bracy's case*, 1 Salk. 349; *Wilkins v. Wright*, 2 O. & M. 291; *Deybel's case*, 4 B. & Ald. 243; *Souden's case*, ib. 294; *Nash's case*, ib. 295.

[9] The tenure of his office during good behaviour is subject to the implied condition of his remaining in the county named in his commission. *Respub. v. McLean*, 4 Yeates, 399.

[10] *Shore v. Anderson*, 7 Sergt. & Rawls, 43; *Schroeper v. Taylor*, 16 Wendell, 196; *Gurnsey v. Lovell*, 9 Wendell, 319; *Kingsbury v. Phipps*, 2 Root, 357.

[11] The necessary recognizance under 4 & 5 Vict. ch. 58; §. 8, in the case of the borough of Camarvon having been entered into in Middlesex before a justice for Warwickshire, the examiner of recognizances appointed under the act held after argument, that a justice of the peace had no authority to take such recognizance beyond his jurisdiction; and the House of Commons, acting on this decision, refused to allow the party to correct the mistake. *Hans. Parl. Deb.* 3d series, vol. 59, p. 1130.

Middlesex, as the recorder is, wheth or he may not commit a person in *Middlesex*, brought out of *London* or *converso*, it seems it hath been always practised, or he is in commission in both places.

If *A.* commits a felony in the county of *B.* where he lives, and goes into the county of *C.* and is there taken, a justice of the peace of the county of *C.* may take his examination and informations in the county of *C.* tho the felony were committed in the county of *B.*[12] yet *quære*, whether upon his arraignment in the county of *B.* those examinations can be given in evidence; I have not allowed them, because tho he may commit and examine, and give an oath to the informers, yea and bind them over to give evidence or commit them, yet that is but for necessity of preserving the peace, for he hath really no jurisdiction in the case.

And *note*, the custom of *London* enables the justices of gaol-delivery to sit at Newgate, which is in *London*, both for *Middlesex* and *London*, but the justices of the peace for *Middlesex* sit only in *Middlesex*, and the justices of the peace for *London* in *London*.

By the statute of 1 & 2 *Ph. & Mar. cap. 13.*[13] they ought to take the examinations of felons (with- [52] out oath,) and the informations of accusers or witnesses (upon oath,) and return them to the justices of gaol-delivery.

And these examinations may be read as evidence against the prisoner, and so may the informations of witnesses taken upon oath, if they are dead or not able to travel, for they are judges of record, and the statute enables and requires them to take these examinations; but then oath is to be made in court by the justice or his clerk, that these examinations and informations were truly taken.

If *A.* brings *B.* before a justice of peace for suspicion of felony, if he can testify materially against him, he may bind him over to prosecute; and, if he refuses, the justice may commit him.[14]

[12] *Johnson v. The State*, 2 *Yerger*, 58.

[13] Repealed and supplied by 7 *Geo. IV. chap. 64.* See post chap. 14. p. 120.

[14] When the justice has decided upon bailing or committing the accused, he should take the recognizance of the prosecutor to prosecute, as also the recognizance of the material witnesses to appear against the party accused, at the next court of oyer and terminer or gaol-delivery, as the case may require. *Dalton*, 164.

If more than one are to be bound, the recognizances should not be taken separately; and the magistrate cannot compel the prosecutor or witness to find sureties for his performance of the condition of the recognizance.

Infants and married women, who cannot legally bind themselves, must get

The justices of the peace have jurisdiction of felonies arising within the verge. 4 *Co. Rep.* 46. *a. Wigg's case.*

The justices of the peace in their sessions may proceed to outlawry in cases of indictment found before them, and that by the common law; and in cases of popular actions may proceed to outlawry by the statute of 21 *Jac. cap.* 4.

But they cannot issue a *capias utlegatum*, but must return the record of the outlawry into the king's bench, and there process of *capias utlegatum* shall issue. *Dalt.* p. 406.

others to be bound for them. Infancy however is no ground for discharging a forfeited recognizance to appear and prosecute for a felony. 13 *Price*, 673.

If the prosecutor or witness refuse to give such recognizance, the magistrate has power to commit him, this being virtually included in his commission and by necessary consequence upon the statute ordering the recognizance to be taken, *post* p. 253; *Bennet v. Watson*, 3 *M. & S.* 1; 2 *Hawk.* ch. 8. § 58; *Cropper v. Horton*, 4 *D. & R. M. C.* 42; *S. C.* 8 *D. & R.* 166. But a justice of the peace is not authorised by law to commit a witness willing to enter into a recognizance for his appearance to give evidence against an offender, merely because such witness is unable to find a surety to join him in such recognizance; nor ought the justice to require such surety: the party's own recognizance (at the peril of commitment) is all that ought to be required. *Per Graham, R. Bedwin Summer Assizes*, 1817; 1 *Burn*. 24th edit. 1013. The justice has no authority to commit a witness for not finding sureties for his appearance. See *Kears v. Rees*, 4 *Per. & Dav.* 32; 12 *Ad. & E.* 55. where Lord Denman quotes the 3d Vol. of *D'Oyly & William's* edit. of *Burn's Justice* and the cases there cited for saying "that the practice of committing witnesses unable to find sureties for their appearance is clearly repugnant to every principle of the English law;" and see the form given in *Lambard's Book*, 2 chap. 7. and in *Dalton*, chap. 176. p. 482. showing this to be the witness's own recognizance only without surety. The party himself need not sign either of the recognizances, to prosecute or to testify, *Dalt.* ch. 176; *Dick* Sess. 87.

The recognizance is an obligation of record, as soon as it is taken and acknowledged; though not made up by the justice and only entered in his book. *Dalt.* ch. 168; see 2 *Burn*, 473. edit. 1845.

Bracton, in speaking of the process in cases of treason says, "Si autem appareat accusator, tunc primo capistur ab eo securitas de proseguendo, et si plegios non habuerit sufficit pro securitate sola fidei datio, et hinc ideo, quia si ad plegios inveniendos districti teneretur, alii se abstinerent a consimili accusatione." *de Corona*, lib. 3. p. 118 b.

See *Glanville* also lib. 14. cap. 1, to the same effect and for a like reason, "ne nimis districtiois securitas, alios terreat a consimili accusatione."

CHAPTER VIII.

CONCERNING THE CORONER AND HIS COURT, AND HIS AUTHORITY IN PLEAS OF THE CROWN.

CORONERS are of three kinds, viz. 1. *Virtute officii*. 2. *Virtute cartæ sive commissionis*. 3. *Virtute electionis*, as the coroners of counties.[1]

I. The coroner *virtute officii* is the chief justice of the king's bench, who by virtue of his office is the chief coroner of England, 4 Co. Rep. 57. b. in case de comminallie de Sadlers, and therefore it is there said, "That in the time of H. 7, it was resolved, if a man be slain in open rebellion, the chief justice upon the view of his body may make a record thereof and send it into the king's bench; and thereupon the party slain shall forfeit his lands and goods," which may be true as to goods, but not as to lands, because none can be attainted after his death but by act of parliament.

But of this hereafter.

II. Coroners by charter or commission or privilege: And these ordinarily were made by grant or commission without election; such are the coroners of particular lords of liberties and franchises, who by charter have power to create their own coroners, or to be coroners themselves: Thus the mayor of London is by charter coroner of London, the bishop of Ely hath power to make coroners in the ilse of Ely, by the charter of H. 7. Queen Catharine had the hundred of Colridge granted to her by the king 35 H. 8. with power to nominate coroners. 9 Co. Rep. 29. b. Amcredith's case.

And therefore by the statute of 28 E. 3. cap. 6. where the power of electing coroners is confirmed to the counties, yet there is a saving to the king and other lords, which ought to make such coroners, their seignories and franchises, so that the king may grant coroners within certain pre- [54]

[1] Coroners are antient officers by the common law, so called because they deal principally with the pleas of the crown, and were of old time the principal conservators of the peace. 2 Hawk. c. 9, § 1.

By the common law the powers and duties of a coroner are both judicial and ministerial. His judicial authority relates to enquiries into cases of sudden deaths by a jury of inquest *super visum corporis*, at the place where the death happened, &c.; and also to enquiries concerning shipwrecks and treasure trove. In his ministerial capacity a coroner is merely a substitute for the sheriff; as where the sheriff is a party, &c. Giles v. Brown, 1 Rep. Con. Ct. 230.

cincts; and lords of franchises, that have power to nominate coroners by charter, may still do it without election.

There have been two great precincts, that by the king's grants have power of granting or having coroners, namely, the jurisdiction of the admiralty, and the verge.

As touching the former I have not seen the grant, but I have heard the lord admiral is either made coroner, or hath power to make them within his jurisdiction; and of the death of a man or other articles belonging to the coroner arising upon the high sea, inquisitions have been usually taken by the coroners appointed by the king or his admiral, and here the coroners of the county have no jurisdiction.

But of deaths of men happening upon arms of the sea below the bridges within the bodies of counties, as upon *Thames* or *Severn*, &c. in ships there hovering, tho the coroner of the admiralty hath jurisdiction, yet it is not exclusive of the jurisdiction of the coroner of the county, who may inquire in any great river upon these articles, where a man can see from one side to the other, 8 *E. 2. Coron.* 399. Only the inquisitions taken before the coroner of the admiral are returned before the commissioners upon the statute 28 *H. 8. cap. 15.* The inquisition before the coroner of the county is to be returned before the commissioners of gaol-delivery for the county.[2]

The other great jurisdiction is the coroner of the king's house, usually called the coroner of the verge, who it seems antiently was appointed by the king's letters patent; but by the statute of 33 *H. 8. cap. 12.* the granting thereof is settled in perpetuity in the lord steward, or lord great master of the king's house for the time being.

Antiently the coroner of the verge had power to do all things within the verge belonging to the office of the coroner, exclusive of the coroner of the county; but because the king's court was moveable often, by the statute of *Articuli super cartas, cap. 3. (a)* it is ordained, that of the death of a man the coroner of the county shall join in inquisition to be taken thereof with [55] the coroner of the king's house; and if it happen it cannot be determined before the steward, process and proceeding shall be thereupon had at common law.

But yet in that case of death within the verge, the coroner of the county cannot take an inquisition without the coroner of the verge; and if he doth, it is void; but if one person be coroner

(a) 2 *Co. Instit.* p. 550.

[2] When a man-of-war is *infra corpus comitatus* the land coroner may go aboard. *R. v. Selgard*, 2 *Stra.* 1037.

of the county and also of the verge, the inquisition before him is as good as if the offices had been in several persons, and taken by both.

And tho the court remove, yet he may proceed upon that inquisition, as coroner of the county. 4 *Co. Rep.* 45 & 46 *Wigg's case*.

But if a murder or manslaughter be done within the precincts of the king's palace limited by the statute of 33 *H. 8. cap.* 12. then by that statute the inquisition shall be taken by the coroner of the household, without the adjoining or assisting of any coroner of any county, by twelve or more of the yeomen officers of the king's household; and this is enacted to be as sufficient, as if taken also by the coroner of the county, and the method of the return and proceeding upon those inquisitions before the lord steward is therein declared and enacted.

III. The general coroners of counties.

These by the statute of *West.* 1. *cap.* 10. (b) and 28 *E.* 3. *cap.* 6. are eligible by the county in the county-court by the king's writ *de coronatore eligendo*, and sworn by the sheriff for the due execution of their office. *F. N. B.* 163. [3]

The statute of *Westm.* 1. directs they should be knights, but that is out of use; but by the statute of 14 *E.* 3. *cap.* 8. they ought to have sufficient lands in the county; and by the statute 28 *E.* 3. *cap.* 6. they ought to be lawful and fit men.

In as much as their office is by election, their offices do not determine by the demise of the king, as sheriffs do. [4] *Dy.* 165. a. (*)

And in as much as they are elected by the freeholders of the county, if they be insufficient and not able to [56] answer their fines, and perform the duties of their place, the whole county shall be answerable for them and their miscarriages, and amercements or fines shall be imposed upon them for the same. (*viz.* if upon process against the coroner for his fine or amercement the sheriff return *nihil habet*.) and process shall go against the whole county, because elected by them. 2 *Co. Instit.* p. 175.

(b) 2 *Co. Instit.* p. 174.

(*) See 4 *E.* 4. 43. a. in *notis ad p.* 101.

[3] The statutes 58 *Geo.* III. *ch.* 95, & *Vict.* *ch.* 12, and 7 & 8 *Vict.* *ch.* 92, provide for the election of coroners and the holding of their inquests.

[4] The coroner is chosen for life, but he may be removed either by being made sheriff or chosen verderer, which are offices incompatible with the other, or by the king's writ *de coronatore exonerando* for a cause to be therein assigned: as that he is engaged in other business, is incapacitated by years or sickness, hath not a sufficient estate in the county or lives in an inconvenient part of it. *Fitz. N. B.* 163, 164; 1 *Black. Comm.* 348.

In some counties there be only two coroners, in some four, in some six, and by the statute of 34 & 35 H. 8. cap. 26. in each county in *Wales*, and in *Chester* two.

If there be above two coroners in a county, and a writ be directed *coronatoribus*, tho one die, yet as long as the plural number remain, a return by the coroners is good; but if there be but only one survivor, he cannot execute the writ and return it till another be made. 14 H. 4. 35. a. 31 Assiz. 20. But if there be two coroners, in a county or more, one may execute the writ, as in case of an *exigent*, but the return must be in the name of the *coronatores*. 14 H. 4. 34. b. per Hank. 39 H. 6. 41.

But tho there be many coroners in the county, an inquisition *super visum corporis* may be taken by any one of them. *Stamf. P. C. p. 59. a.*

As coroners may be elected by writ *de coronatore eligendo*, so they may be removed for reasonable cause, and new ones chosen in their room by writ.

And altho that cause be not traversable, 5 Co. Rep. 58. b. yet if it be false, he may have a *superedeas* to that new writ. *F. N. B. p. 163.*

Thus far concerning the constitution of these officers and their different kinds; now touching their jurisdiction and proceeding.

Before the statute of *Magna Carta*, cap. 17.(c) the coroner held pleas of the crown, by that statute *nullus vice-comes, constabularius, coronator vel alii ballivi nostri teneant placita coronæ*, so that thereby their power in proceeding to trial or judgment in pleas of the crown is taken away.

But yet they retained a jurisdiction still as to matters [57] of inquiry, taking of appeals, &c. all which is set down at large in the statute of 4 E. 1. styled *De officio coronatorum*, viz. 1. Of the death of a man, whether by felony, misfortune, &c. viz. *de subito mortuis*. 2. Of *treasure-trove*. 3. Of appeals of rape. 4. Appeals *de plagis & mahemio*. 5. Of *deodanda*. 6. Of wreck of the sea; and 7. By some, of breach of prison.(d) I shall reduce them to these four, viz.

1. His power to take inquisitions *super visum corporis*. 2. His power to take appeals. 3. His power to take the accusation of an approver. 4. His power to take abjuration.

I. For inquisitions.

Regularly the coroner hath no power to take inquisitions, but touching the death of a man and persons *subito mortuis*, and some special incidents thereunto.

If any person dies suddenly, tho it be of a fever, and the township bury him before the coroner be sent for, the whole

(c) 2 Co. Instit. p. 32.

(d) Vide Coron. p. 435.

township shall be amerced. *Ilin. North. Coron.* 319. *Nota*, this case is misprinted, I have seen an antient transcript at large of the *Iter of North'ton*, and perused this very case, which in *libro meo f. 52. b.* is *morust de feyme, viz.* starved by hanger; for tho a man dies suddenly of a fever or apoplexy, or other visitation of God, the township shall not be amerced, for then the coroner should be sent for in every case; [5] but if it be an unnatural or violent death, then indeed if the coroner be not sent for to view the body, the town shall be amerced.

And so it is if the vill leaves a body, that died of a violent death, above ground unburied, the township shall be amerced, *3 E. 3. Coron.* 339. and the ameracements in these cases may be set upon the presentment of the grand inquest, or upon the presentment of the coroner.

But if a prisoner in gaol dies a natural death, yet regularly the gaoler ought to send for the coroner to inquire, because it may be possibly presumed, that the prisoner died by the ill usage of the gaoler. [6]

And if this death happens in the king's bench, the clerk of the crown, who is the coroner for that court, [58] is to view the body. *3 E. 3. Coron.* 292. *8 E. 2. Coron.* 421.

If the coroner have notice and comes not in convenient time to view the body and take his inquisition upon the death of him, that thus dies suddenly, and therefore upon a presentment by the grand inquest of a death by misadventure, if the like presentment be not found in the coroner's roll, he shall be fined and imprisoned. *3 E. 3. Coron.* 292.

And by the statute of *1 H. 8. cap. 7.* he shall forfeit forty shillings for every such default, and the justices of the peace and justices of assise have power to enquire of those defaults, and this without any fee to be taken by the coroner. But by the statute of *3 H. 7. cap. 1.* if the coroner be remiss, and makes not inquisitions upon persons slain, or doth not return the same to the next gaol-delivery, he is to forfeit 5*l.* for every default.

[5] Coroners ought not, in general, where a party dies by the visitation of God, as from apoplexy or the like, nor in any case, unless a very doubtful one, unnecessarily to obtrude themselves into private families for the purpose of instituting enquiry. *R. v. Justices of Kent*, 11 *East*, 229. They should in general wait until they are sent for by the peace officers of the place where the violent or unnatural death occurred, before holding an inquest. 2 *Burn*, 32. *edit.* 1845.

[6] For if the prisoner by the duress of the gaoler come to an untimely death, it is murder in the gaoler and the law implies malice in respect of the cruelty. 3 *Inst.* 62. 91.

And this inquest upon prisoners ought formerly to consist of a party jury, that is, six of the prisoners (if so many there be) and six of the next vill or pariah, not prisoners. *Unfreville's Coron.* 212.

The coroner cannot take an inquisition but upon the view of the body, and if he doth, such inquisition is void; and the reason is, because oftentimes much of the evidence ariseth upon the view, for the inquisition ought to contain the manner of his death, the place, length and depth of the wound, &c.[7]

And therefore tho where there are many coroners, one may take the inquisition. *Stamf. 53. a.* yet it cannot be done by deputy,[8] for by the statute of *Exon. 14 E. 1.* the coroner is to view the body and take the inquisition in his own person. *Crompt. Justice, f. 227. a.*

And therefore if the body be buried before the coroner comes,[9] tho the coroner ought to record it, and the township shall be thereupon amerced, as before is said, yet the coroner ought to take up the body, and take his view thereof, if there be any possibility of it; and therefore the body hath in such case been taken up fourteen days after, and an inquisition thereupon taken.[10] 2 *R. 3. 2. a. 21 E. 4. 70, 71. Wingfield's case.*

And therefore if the coroner take an inquisition without view of the body, he may take a second inquisition *super visum*

[7] Yet it is not necessary that the inquisition be taken in the very same place where the body was viewed; for it hath been resolved that an inquisition taken at D. on the view of a body lying dead at L. may be good. 2 *Hawkins, 48.*

If the body cannot be found, or have lain so long before the coroner hath viewed it, that he can be no way assisted from the view in the taking of his inquest, or if there be danger of infecting people in digging of it up, the inquest ought not to be taken by the coroner, unless he hath a special writ or commission for that purpose; but by justices of peace or other justices authorized to enquire of, hear and determine felonies, &c., who shall take the inquest on the testimony of witnesses: but none can take an inquest on view in any case but the coroner. *Ibid.; 5 Rep. 110; 2 Rol. Abr. 96; ex parte Schultz, 6 Wharton, (Penns.) Repe. 269.*

[8] *R. v. Ferrand, 3 B. & A. 260; In re Dawes, 8 Ad. & E. 936.* his performance of a judicial duty by deputy was treated as a nullity. *Ex parte Ceruthers, 2 M. & R. 397.*

This applies equally to coroners *virtute commissionis*; who cannot by prescription delegate their authority. *Jervis, 56.*

The coroner of the admiralty by virtue of his patent may appoint a deputy. 2 *Burn, 29. edit. 1845.*

Quære, whether a custom for a coroner to appoint a deputy is bad. *Ex parte Ceruthers, 2 M. & R. 397; see 6 & 7 Vict. c. 83. § 1; and R. v. Perkins, 14 Law J. N. S. 87; 9 Jur. 686.*

[9] And by Holt, C. J. it is a matter indictable to bury a man that dies a violent death, before the coroner's inquest has sat upon him. 2 *Burn, 29. edit. 1845.*

[10] The inquest must be taken within a reasonable time after the death; hence seven months has been held too late. *R. v. Bond, 1 Str. 22; R. v. Clerk, Salk, 377; Holt, 167, S. C.*

The proceeding by inquisition being judicial must not be conducted on Sunday. See 9 *Co. 666; 2 Burn, 30.*

It would seem that coroners may be amerced for taking up a body that has been buried so long that from its state of decomposition no information can result from the view. *R. v. Parker, 2 Lev. 140.*

corporis, and that second inquisition is good for the first was absolutely void. 2 R. 3. 2. 21 E. 4. 70.

But if a coroner takes an inquisition *super visum corporis*, and after this another coroner takes an inquisition upon the same matter, the second inquisition is void, because the first was well taken. M. 6 R. 2. Coron. 107. *Crompt. Justic.* 229. b.

If a coroner takes an inquisition *super visum corporis*, (as upon a *felo de se*;) and that is sent into the king's bench and quashed, the coroner may take a new inquisition *super visum corporis*.

But upon a surmise, that the coroner ought to have found him *felo de se* and hath not, there shall be no *melius inquirendum* directed to the sheriff; I have known it often denied, and it was held it was within the restraint of the statute 28 E. 3. cap. 9.

But possibly a commission or writ may issue for the inquiry of the goods of a felon not mentioned in the coroner's inquisition.

If the coroner do not inquire of a *felo de se*, or of any other sudden death, the justices of the peace or *oyer* and *terminer* may enquire thereof, and so may the justices of the king's bench, but then that presentment is traversable; but it is held that the presentment of the coroner of a *felo de se* is not traversable, *de quo supra*, Part I. cap. 31. p. 414. *Co. P. C. cap.* 8. p. 55.

When notice is given to the coroner of a misadventure, he is to issue a precept to the constable of the four or six next townships to return a competent number of good and lawful men of their townships, [11] viz. twelve at least to make an inquisition touching that matter. 4 E. 1. *Officium coronatoris*.

If they make not a return, or the jurors returned appear not, their defaults are to be returned by the coroner, and the constables or jurors in default shall be amerced before the justices in eyre-antiently, but now before the justices of gaol-delivery. [12]

But if the jurors appear, by *Crompt. Justice*, f. 226. b. they are not challengeable by either party.

Yet in *Mich. 4 Car. B. R.* Sir William Withipole's case by the greater opinion of all the judges of Eng- [60]
land the statute of 11 H. 2. cap. 9. extends to inquisi-

[11] It is sufficient if the inquest be by lawful persons of the county. (2 Hawk. ch. 9. § 22.) The jury must consist of twelve at the least and twelve must agree in the verdict. (*Lambert v. Taylor*, 6 D. & R. 196.)

[12] By the 7 & 8 Vict. ch. 92, sect. 17, coroners are now empowered to fine non-attending jurors or witnesses not exceeding 40s.

The coroner's power to summon an inquest includes the incidental means of rendering that power efficient; and he may therefore rightfully impose a fine on a juror who refuses to attend. (*Ex parte McNulty*, *Charlt.* 310.)

tions before the coroner, and that if in an inquest before the coroner one of the jurors be outlawed tho but of trespass, this is a good plea to a coroner's inquest of murder. *Cro. p. 134.*

The jury is to be sworn and charged to inquire upon the view of the body how the party came by his death, whether by murder by any person, or by misfortune, or as *felo de se*.

In such cases, where the coroner's inquest is conclusive, [13] (as it is commonly held in the case of *felo de se*,) the coroner must hear evidence as well against the king's interest as for it, and that upon oath, for there is no person to be condemned to death, but only the fact to be inquired into. [14]

And so it was ruled in *Barclait's* case who drowned himself, and the coroner would not admit witnesses to prove him to be *non compos mentis* at the time, but shut them out, and only took witnesses for the king; and for this cause the coroner was reprehended by the court of king's bench, and the inquisition set aside and not suffered to be filed, and a new inquisition taken, whereby it was found he was *non compos*, for in this case there was no person put to answer, *de hoc vide supra, Part I. p. 415.*

But it hath been held, that if a person be killed by another person, and it be certainly known that he killed him, the jury must hear evidence only for the king; and whether the killing were by malice or without malice, nay tho it were such a killing as is justifiable, as an officer killing one that assaults him in doing his office, yet the inquest must find it murder, because the party shall be put to answer, and upon not guilty pleaded the whole matter will come to be tried by the petit jury, where the evidence of both sides may be openly heard in court, and such direction given as the nature of the fact requires, *viz.* to be murder, manslaughter, or *per infortunium*: and thus it hath been commonly practised of later years.

But it seemeth to me, that this is neither reasonable
[61] nor agreeable to law or antient usage, but is a novelty as to the case of the coroner's inquest, tho it may be

[13] It appears by the best authorities that the inquests of the coroner are in no case conclusive and that one affected by them either collaterally or otherwise may deny their authority and put them in issue. (*R. v. Parker*, 3 *Kebl.* 489. See *Garnett v. Ferrand*, 6 *B. & Cress.* 615, 627; *R. v. Ewell*, 9 *D. & R.* 247.) And it is now settled that an inquisition of *felo de se* may be removed into the king's bench and traversed by the executors or administrators of the deceased. (1 *Sess.* 363 *n. e.*) Doubts have been entertained whether inquisitions of flight and *felo de se* are traversable, but it seems they are. (See *Jerr.* 282 to 284; 1 *Saund.* 363. *n.* 2 *Burn.* 43, *edit.* 1845.)

[14] The court of king's bench granted a rule against the coroner to show cause why a criminal information should not be filed against him for refusing on taking an inquisition *super visum corporis* to receive evidence on the part of the person accused. (*R. v. Severy*, 1 *Leach, C. C.* 43.)

and is reasonable and fit in case of an indictment by the grand inquest of the county, [15] for these reasons: 1. Because the coroner's inquest, is to inquire *truly(e) quomodo ad mortem devenit*, and is rather for information of the truth of the fact as near as the jury can assert it, and not for an accusation. 2. Because tho the prisoner may be arraigned upon the coroner's inquest, if it find it murder or manslaughter, yet neither the court nor the prosecutor is concluded by it, but a bill of murder may be preferred to the grand inquest; and upon that new presentment the party may be arraigned and tried, tho the coroner's inquest arises only to manslaughter, or it may be to *se defendendo* or chance-medley. 3. And accordingly the antient practice hath been, for the coroner's inquest to find the matter as they judge it was: *vide 26 Eliz. Crompt. Justice, f. 28. a. Holmes's case, Coke's Entries 353. b.* and very often in the antient *Iters* of *E. 2.* and *E. 3. de quo supra.*

And therefore the difference of the penning of the act of 1 & 2 *P. & M. cap. 13.* touching the examinations taken by the justices of the peace and the coroner is observable: The justices of the peace are to put into writing the informations against the felon of the fact and circumstances thereof, or *so much thereof as shall be material to prove the felony*; but the coroner is to put into writing *the effect of the evidence given to the jury before him being material*, without saying *so much as is material to prove the felony*, but the whole evidence given whether to prove or disprove the felony; and all this evidence is to be upon oath before the coroner's inquest, whether it makes for or against the prisoner: but indeed when the prisoner is to be tried upon that indictment, or the indictment of the grand inquest, those witnesses, that acquit the prisoner, are not to be heard upon oath at his trial, unless the prosecutor desires it. (f)

(e) Why should not this argument hold as well in the case of an indictment by the grand inquest, since they are likewise by their oath to *present the truth, the whole truth, and nothing but the truth?* *vide infra, p. 157.*

(f) This was indeed the practice, tho unsupported by any authority in law; but now by 1 *Ann. cap. 9.* the witnesses on the behalf of the prisoner in all trials for treason or felony are to give evidence upon oath.

[15] The finding of the grand jury is regarded as of more weight than an inquisition taken before the coroner; as the court will in their discretion, bail after the latter, but always refuse after the former; the reason of which may be, that in one case they can look into the depositions to see if the evidence supports the charge of murder, whereas in the other the investigation is secret and does not admit of a summary revision: (*R. v. Dutton*, 2 *Stra.* 911; *R. v. Magrath*, *id.* 1243; 2 *Burn* 43, *edit.* 1845.) Inquisitions of felony ought to be as certain as indictments. (*R. v. Clerk, Holt*, 167.) Nothing shall be taken by intendment in them. (1 *Sess. Rep.* 356.)

So that I do conceive the coroner's inquest ought in all cases to hear the evidence upon oath, as well that which maketh for, as that which maketh against the prisoner, and the whole evidence ought to be returned with the inquisition. [16]

Now sudden violent deaths, which are all within the coroner's office to inquire, are of these kinds. 1. *Ex visitatione Dei*. 2. *Per infortunium*, where no other had a hand in it, as if a man falls from a house or cart. 3. By his own hand, as *felo de se*. 4. By the hand of another man, where the offender is not known. 5. By the hand of another, where he is known, whether by murder, manslaughter, *se defendendo*, or *per infortunium*.

1. If the inquest find that he died *ex visitatione Dei*, there is no more to be done, only the inquisition, together with the examinations, are to be returned to the next gaol-delivery, by the statute of 3 H. 7. cap. 1.

2. If the inquest find the death *per infortunium* simply, as by a fall, &c; then the coroner is to take the examination, and return the same with the inquisition to the next gaol-delivery, and to inquire of the deodand, and the value, and in whose hands; and to seize and deliver the same to the township to be answerable for the same to the king, by the statute of 4 E. 1. *De officio coronatoris*.

But if the person were drowned in a pit, the coroner shall command the vill to stop it, and if it be not done, the vill shall be amerced in *eyre*, or before justices of gaol-delivery. 8 E. 2. *Coron.* 416.

[16] The coroner ought it seems to examine a medical witness as to the cause of the death. *R. v. Quinch*, 4 C. & P. 571. The stat. 6 & 7 Will. IV. ch. 89. provides for the summoning of medical witnesses and the performance of post mortem examinations, &c.

It is the duty of a coroner in a case of death occurring in a pugilistic encounter, to examine a surgeon as to the cause of the death. *R. v. Quinch*, 4 C. & P. 571.

The Supreme Court of Pennsylvania held it the duty of a coroner in every case of homicide to make a post mortem medical examination, and that the bounty was bound for the expense of such proceeding, and this without statutory provision. *Com. v. Harman*, 4 Barr. (Penns.) Reps.

It is illegal to publish a statement of the evidence given before the coroner's jury, even though it be correct, and the party publishing it be not actuated by any malicious motives. *R. v. Fleet*, 1 B. & Ald. 379; and see *R. v. Fisher*, 2 Camp. 563; *Duncan v. Thwaites*, 3 B. & C. 556; *R. v. Clement*, 4 B. & Ald. 218.

Much doubt and discussion have arisen as to the power of the coroner to exclude individuals from the inquest. It may now however be fairly inferred from the late case of *Garnett v. Ferrand*, 6 B. & C. 611; 9 D. & R. 657, that the coroner has the power of excluding not only particular individuals, attorneys and counsel, &c. but the public generally. See 2 Burr. 36. edit. 1845.

One inquisition may be taken on the dead bodies of several persons who have been killed by the same cause and died at the same time. *R. v. West*, 1 Gale & D. 481.

And *note*, that in no case the coroner sets any fine or amercement as for non-appearance of juries or constables, escapes of townships, &c. but only presents it to the next justices in *eyre*, or now to the next gaol-delivery, and they impose the fine.

3. If the inquest find a man *felo de se*, they ought to find the special matter, and also what goods and chattels he had, of what value, and seize and deliver the same to the township to be answerable to the king or his almoner, or the lord of the franchise, to whom they belong, and shall bind over the first finder of the body to the next gaol-delivery.

4. If the party be slain and the felon is not known, they are to find their inquisition accordingly, and shall [63] bind over the first finder of the body to the next gaol-delivery, and return his examinations, together with his inquisition, by the statute of 1 & 2 P. & M. cap. 13.

And *note*, that the antient manner of inquiry in this case, whether by the coroner or justices in *eyre*, was, 1. *Quis primus inventor?* 2. *An male creditur?* If so, then if he were present, he might be arraigned; if absent, they went on to the outlawry against him; but if they answered, *non male creditur*, then he was discharged. 35 H. 6. 15. a. B. *Conspiracy*, 4.

5. But if the person was slain, and the party that did it was known, and the inquisition found him guilty of the death, or that he died by his hand, there were these proceedings, namely, The inquest were also to inquire of all that were present, aiding and abetting.

They shall also inquire of all accessaries *before* the fact, but they cannot inquire of accessaries *after*, (*) and therefore a presentment of a *fugam fecit* upon an accessary *after* is void. *Stamf. P. C.* 183, 184. 4 H. 7. 18. b.

If they find a man guilty as principal or as accessary *before*, they are also to inquire whether he fled for the same; for if the party be acquit upon his trial, nay tho the petit jury upon his trial find him not guilty, nor that he fled, yet this inquisition before the coroner shall cause a forfeiture of his goods, for it is not traversable. *Dy.* 238. b. *Stamf. P. C.* p. 183. b. (†)

If a party be found guilty by the coroner's inquest, or that he fled, they are also to inquire of his goods and chattels; and by the antient law the coroner was presently thereupon to seize and inventory his goods, and deliver them to the *villata* to be answerable to the king for them, as appears by the sta-

(*) *Vide Part I. p. 416. in notis.*

(†) *Vide Part I. p. 363 & p. 417.*

tute of 4 *E. 1.* how far this is altered by the statute of 1 *R. 3. cap. 3. vide quæ supra, Part I. cap. 27. p. 365.*

But it seems, that if there be a presentment before the coroner of a *fugam fecit*, the statute of 1 *R. 3.* takes [64] no place as to that, because, whether convict or acquitted, the *fugam fecit* stands as an unavoidable forfeiture, and therefore the coroner may without question seize the goods so found by inquisition upon a *fugam fecit*, and commit them to the township.

If the persons, that are found guilty by the inquest, be taken, the coroner may and must commit them to the sheriff, and he is to send them to the gaol by the statute of 4 *E. 1.* But if any were present and found not guilty, the coroner was to bind them over to the next goal-delivery by the same statute, and to record their names in his roll: This was to the intent, that if farther evidence was discovered against them, they might be there proceeded against, if not, then they might be used as witnesses; but the statute of 1 & 2 *P. & M. cap. 13.* hath made better provision; *de quo infra.*

If the parties found guilty as principals or accessaries before by the coroner's inquest be not to be found, the coroner might proceed to the outlawry against them at common law, *quod vide 27 Assiz. 47. viz. by process of capias* to the sheriff; and if they were returned *non inventi*, then they were demanded at five counties and outlawed: *vide Crompt. Justice, p. 226. b.*

But now that course is altered, and the coroner ought not to proceed to the outlawry, but is to return his inquisition to the next gaol-delivery by the statute of 3 *H. 7. cap. 1.* and the justices of gaol-delivery are to proceed against the offenders, if in gaol; and if not in gaol, then to certify the inquisition into the king's bench, and there process of outlawry to go against them upon that inquisition.

And by the statute of 1 & 2 *P. & M. cap. 13.* the coroner is to take the examinations against the principals and accessaries before, and put them in writing, and bind over witnesses by recognizance to the next goal-delivery, and then to return their examinations, recognizances, and inquisitions upon pain of 40s. for every default.

In case of an indictment of murder or manslaughter by the grand inquest, if the prisoner appears, pleads, and be acquitted by the petit jury, they say so and no more, only they inquire of the flight.

But if a person be found guilty by the coroner's [65] inquest, and plead and be acquitted, yet in as much as the coroner's inquest have found that he was kild,

the court gives credit to it, and therefore the petit jury must also give in, who it was that kild him, which serves as an indictment against that other person. 13 *E.* 4. 3. *b.* 14 *H.* 7. 2. *b.* and commonly if they cannot tell, they give in some fictitious name as *John a-Noke*, which serves the turn.

If there be an inquisition of manslaughter or murder, and also an indictment by the grand inquest for the same offense, and he is arraigned and found not guilty upon the indictment by the grand inquest, yet it is necessary to quash the other inquisition or arraign the party upon it, and he is to plead *autrefois acquit*, or *not guilty*, and so be acquit upon that also, for it otherwise stands as a record against him, upon which he may possibly be outlawed.

But if both indictments be of the same nature and for the same offense and be good, he may be arraigned and tried upon both at once.

By the statute of *Westm.* 1. *cap.* 10. the coroner was to take nothing for the execution of his office touching the death of a man.

But by the statute of 3 *H.* 7. *cap.* 1. in cases of murder or manslaughter he was to have the fee of 13s. 4d. out of the goods of the felon, or out of the amercement set upon the township for an escape.

But by the statute of 1 *H.* 8. *cap.* 7. for an inquisition upon the death of a man by simple misfortune or misadventure, he is to take nothing upon pain of forfeiting forty shillings.

1. By what hath been before said it appears, that the coroner hath power to take an inquisition of felony of the death of a man, and likewise of certain incidents thereunto. 1. Of accessaries before the fact, but not of accessaries after. 2. Of the escape of the manslayer, that thereupon the township may be amerced, which is farther confirmed by the statute of 3 *H.* 7. *cap.* 1. 3. Of his flight. 4. Of his goods and chattels: But he hath no power to take an inquisition of any other felony, tho in some cases he hath power to take [66] appeals of other matters, as shall be said hereafter.

2 *Co. Instil.* p. 32. Only by custom in *Northumberland* the coroner hath power to inquire of other felonies. 35 *H.* 6. 27. *b.*

But it is said that he may take the confession of him, that breaks prison, and upon his record thereof the party shall be hanged. 8 *E.* 2. *Coron.* 435.

2. But altho he hath power to take an inquisition touching the death of a man, it must be *super visum corporis*, and not otherwise.

And therefore in antient times if a man were hurt in the county of *A.* and died in the county of *B.* the coroner of the

county of *B.* could not take an inquisition of his death, because the stroke was not given in that county, nor could the coroner of the county of *A.* take an inquisition, because the body was in the county of *B.* but they used to remove the body into the county of *A.* and there the coroner of that county to take the inquisition. 6 *H.* 7. 10. *a.*

But this would not avail, till the statute of 2 & 3 *E.* 6. *cap.* 24. [17] gave a remedy in this case by indicting and trying him in the county where he died.

But if he were stricken and had also died in the county of *A.* and the body had by some means been after removed into another county, he ought to be removed into the county of *A.* where he was stricken and died.

3. That altho he might take an indictment of death, and at common law proceed to outlawry, yet by the statute of *Magna Carta*, *cap.* 17. he was disabled to hear or determine *that* felony, or to make execution upon the outlawry.

4. But tho the coroner could not take any inquisition but *super visum corporis*, yet in some cases, that were not felony, he might take an inquisition; as 1. *De Thesauro invento.* 2. Of wreck and royal fish. 3. And it seems he had a power to attach a person, that had dangerously wounded another, and that not only upon an appeal of mayhem, but also *ex officio*, as a thing tending to danger of death; *quod vide* 4 *E.* 1. *De officio coronatoris.*

And thus far touching inquisitions before the coroner. [67] II. The second thing, wherein the coroner's power lies, is taking of appeals, namely appeals of murder, appeals of robbery, appeals of rape, appeal *de plagis & make-mio*; and this appears by the statute of 4 *E.* 1. *De coronatoribus.*

These appeals can be taken only of facts done within the county, whereof he is coroner. *Stamf. P. C. f.* 63. *a.* (g)

This appeal is to be by bill in proper person, and before the coroner and sheriff: *vide stat.* 34 *H.* 7. *cap.* 1.

But yet the coroner is the principal judge, and therefore a *certiorari* to remove such a bill may be to the coroner alone.

(g) & 52. b.

[17] This stat. is repealed by 7 *Geo.* IV., *ch.* 64. which provides, sect. 12. "When any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined and punished in any of the said counties in the same manner as if it had been actually and wholly committed therein."

4 H. 6. 16. a. Dy. 222. b. or to the coroner and sheriff, because by the statute of *Westm. 1. cap. 10.* the sheriff hath a counter-roll. 38 E. 3. 14. b. *Register* 284. a. Dy. 223. a. But not to the sheriff alone neither for appeals nor outlawries, unless in *London.* Dy. 317. a.

Altho by the statute of *Magna Charta, cap. 17.* the coroner cannot determine the appeal, yet he may do these things. 1. He may record the nonsuit of the plaintiff in an appeal by bill before him, 22 *Assiz.* 93. 2. He may award a *capias* and *aliàs* to the sheriff, and may thereupon demand the defendant at five counties, and outlaw the defendant, 22 *Assiz.* 97. tho *Stamford* makes a doubt of it, *Lib. II. cap. 14. f. 64. a.* and thinks that the appeal must be removed by *certiorari* into the king's bench, and there only process of outlawry can issue; but when the appeal is sued before the coroner and sheriff, to have the appeal determin'd it must be removed into the king's bench by *certiorari.*

III. The third power of the coroner is to take the accusation of an approver, namely when a person is indicted before justices of gaol-delivery or in the king's bench for any felony, he may confess the offense, and impeach or accuse or appeal others of felony, and thereupon the court assigns him a coroner to take his confession.

The coroner upon an appeal of an approver may take an appeal of the approver against any person for any felony or treason committed in the same county, or in [68] any other county. 19 E. 3. 42. *Coron.* 462.

If the appeal be in the same county, it seems the coroner may make a precept to the sheriff to take the person appeal'd; but if he be only a coroner of a franchise, it seems he may make a precept to the sheriff to attach him, *quare*; but howsoever he cannot make a precept to the bailiff of the franchise, because the bailiff of a franchise cannot execute a process within his franchise, but by the precept of the sheriff. 29 E. 3. 42. *Coron.* 462.

And therefore it seems in that case he must return the appeal before the judge of gaol-delivery within the franchise, and he may make process within the franchise to the sheriff; *vide* the case of *Ely*, 29 E. 3. 41. b. *quare*, how the usage is there, *viz.* whether the judge makes process out of the liberty, and to whom.

But if the appeal be of a felony or treason out of the county, the same must be removed or certified to the justices of gaol-delivery, and they may make process into any county of *England* to take the person appeal'd; and so the case of an appeal by an approver differs from the appeal by a person griev'd.

5 H. 5. *Coron.* 437. 29 E. 3. 42. *Coron.* 462. *Stamf. P. C. Lib. I. cap.* 52. f. 53.

IV. The fourth power of the coroner is to take the confession of a felony by a felon, tho the felony were committed in any foreign county, and to take his abjuration. *Stamf. f.* 53.

But by the statute of 1 Jac. cap. 25. continued by 21 Jac. cap. 28. the whole business of sanctuary, and the abjuration before the coroner relative to sanctuary, is taken away; and therefore it is needless to repeat the office or power of the coroner in relation to sanctuary. *Co. P. C. cap.* 51.

[69]

CHAPTER IX.

CONCERNING THE SHERIFF, HIS POWER IN PLEAS OF THE CROWN,
AS WELL BY COMMISSION, AS IN HIS TURNS.

THE power of the sheriff [1] to hold pleas of the crown, as well as the coroners and other the king's bailiffs, is restrained and taken away by *Magna Charta*, cap. 17. recited in the former chapter.

Yet after that statute he had power to receive indictments

[1] At common law the sheriff was elected by the county, his appointment was first enacted by 14 Edw. III. st. 1. ch. 7.

Every sheriff is a principal conservator of the peace by the common law and may *ex officio* award process of the peace and take surety for it; and it seems to be the better opinion that the security so taken by him, is by the common law looked on as a recognizance or matter of record and not as a common obligation. 2 Hawk. c. 8. s. 4.

But by 1 Mar. Sess. 2. ch. 8. no sheriff shall exercise the office of a justice of the peace in any county wherein he is sheriff; and in such case his acts as a justice shall be void.

As the keeper of the king's peace both by common law and special commission he is the first man in the county and superior in rank to any nobleman therein, during his office. He may apprehend and commit to prison all persons who break the peace or attempt to break it; and may bind any one in a recognizance to keep the king's peace. He may, and is bound *ex officio* to pursue and take all traitors, murderers, felons and other misdoers and commit them to gaol for safe custody. He is also to defend his county against any of the king's enemies when they come into the land: and for this purpose as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse comitatus* or power of the county: and this summons every person above fifteen years old and under the degree of a peer is bound to attend upon warning, under pain of fine and imprisonment. 1 Blacks. Comms. 342.

He is *ex officio* a conservator of the peace. *Coyles v. Hurttin*, 10 Johns. Reps. 85.

Held in Missouri that he is not a judicial officer: a bond taken by him in a criminal case is void. *State v. Walker*, 1 Miss. Reps. 546. See *Bengough v. Recorder*, 2 H. Blacks. Reps. 418.

and presentments of felony, tho he had not power to determine them.

And this power was of two kinds, *viz.* special by virtue of a special writ or commission, and general or *virtute officii* in his *Turn*.

The former of these powers, *virtute brevis* or *commissionis*, continued in use till the statute of 28 *E. 3. cap. 9.* and by that statute all former commissions and writs of that nature are repealed; and enacted, that for the future no such commission or commissions shall be granted.

And therefore *H. 37 Eliz. B. R.* where the coroner found a death *per infortunium*, and it was surmised for the king, that he was *felo de se*, and a *melius inquirendum* prayed to the sheriff; ruled that none should issue, because contrary to the statute.

The latter power of the sheriff is *virtute officii*; and this still continues in the sheriff, namely, that he hath power in his *Turn* to take inquisitions of felonies, that were felonies at common law; but the sheriff cannot take any inquisition of any felony created by act of parliament, unless the same act likewise gives him jurisdiction; and therefore the sheriff in his *Turn* cannot take an inquisition of rape.

This court is a court of record, and the sheriff or his steward or cleyk is judge in it, the style *Placita coram* [70] *vicecomite com' S. in Turno.*

The indictments taken here have these requisites.

1. That the courts be held *infra mensem Paschæ, & mensem Michaelis* by the statute of 31 *E. 3. cap. 15.* or else they lose their turn for that time, which hath been expounded their court so held for that turn only shall be void. *Stamf. P. C. f. 84. b. 6 H. 7. 2. a. 38 H. 6. 7. a.*

2. The indictment must be under the seals of the indictors, and by twelve jurors at least by the statute of *Westm. 2. cap. 13.(a)* And by the statute of 1 *E. 3. cap. 17.* it must be by rolls indented between the sheriff and the indictors, (which last statute extends also to leets and franchises;) otherwise the indictments are void; and one of the indictors must shew one part of the indenture to the justices, when they come to make deliverance.

3. By the statute of 1 *R. 3. cap. 4.* the indictors in the sheriff's *Turn* must have 20*s.* freehold, or 26*s. 8d.* copyhold, and be of good name, otherwise the sheriff or bailiff shall forfeit 40*s.* and the indictment is void.

And therefore, if any be arraigned of felony upon such an

indictment, he may plead that one of the indictors had not 20s. freehold, nor 26s. 8d. copyhold; so that when it is said *it shall be void*, it must be intended void by plea; for if the prisoner excepts not to it upon his arraignment, he is concluded by that omission.

Upon these indictments of felonies in the sheriff's *Turn*, tho they could not proceed to hear and determine them by reason of the statute of *Magna Charta*, cap. 17. yet the sheriff did commonly make out process or precepts in nature of *capias* to arrest the parties, as appears by the statute of *Westm.* 2. cap. 13.

But now by the statute of 1 E. 4. cap. 2. their power of making out process upon these indictments is taken away, as well in case of indictments of felony, as other misdemeanors within their cognizance; but they are to deliver all such presentments [71] and indictments to the justices of the peace at their next sessions, who are to make out process thereupon, and hear and determine them; but if the original presentment were not within the jurisdiction of the *Turn*, the justices of peace ought not to proceed upon such indictments, tho removed before them. 4 E. 4. 31. a. 8 E. 4. 5. b.

And what hath been said touching the *Turns* of sheriffs is in a great measure applicable to leets, namely they have power to receive indictments of felonies at common law, but not of felonies by act of parliament, unless specially limited to them.

The statutes of *Magna Charta*, cap. 17. 1 E. 3. cap. 17. extend to them as well as to *Turns*, but not the statute of 1 E. 4. and therefore they cannot hear and determine felonies presented in them, but must send their indictments of felonies to the justices of gaol-delivery there to be heard and determined, if the offenders are in custody, 8 H. 4. 18. a. *Franchise* 2. or remove by *certiorari* into the king's bench, that process may be made upon them to an outlawry.

And thus far concerning the ordinary jurisdiction, wherein felonies are inquired of, heard or determined; I have wholly omitted the courts in *eyre*, the courts of the *stuple*, and the franchise of *insangthief* and *unsangthief*, because they are wholly disused, and the learning concerning them rather for curiosity and antiquity, than for use in this business of pleas of the crown. The jurisdiction also of the royal franchises of *Ely*, *Hexham* and *Hexhamshire*, and other particular franchises remaining excepted by the statute of 27 H. 8. cap. 24. are but particular jurisdictions, and not so useful for the pleas of the crown, as for a tract concerning the jurisdiction of courts.

And thus far touching the ordinary jurisdictions in cases capital.

CHAPTER X.

CONCERNING THE APPREHENDING OR ARRESTING OF FELONS AND TRAITORS BY PRIVATE PERSONS, AND ESCAPES.

HAVING in the foregoing chapters considered the several courts of ordinary jurisdiction, where traitors and felons are to be proceeded against; I shall now descend to the consideration of the means and method of bringing such offenders to trial, judgment, and execution.

And herein I shall observe this order, first to consider those courses, that are preliminary to their arraignment, and afterwards to consider of their arraignment, and those proceedings, that are subsequent thereunto, their trial, judgment, and execution.

Concerning the former, namely the courses preliminary to their arraignment, they are principally these, *viz.* 1. The arrest or apprehending of them. 2. Their imprisonment or commitment, and therein of bailing or discharging them before indictment. 3. Their indictment.

Touching the first of these, namely their arrests or apprehending them.[1]

This is the first instance of their prosecution, and this is done either, 1. By private persons by virtue of the law, or 2. By officers or *virtute officii*, or 3. Upon hue and cry levied, or 4. By warrant or precept *virtute præcepti*.

But before I come to these I will consider something concerning escapes of felons, and what punishment lies upon *them* that permit it, which will open the consideration of what is every person's duty in this case; and by this escape I do not mean escapes suffered by sheriffs or gaolers, but escapes suffered by vills, townships, or private persons.

If there be a murder or manslaughter committed either in the day or night in an inclosed town, if the [73] murderer be not taken, the town or city shall be amerced upon a presentment thereof, either by the coroners

[1] All persons whatsoever are without distinction equally liable to arrest in all criminal cases. 4 *Blacks.* 289.

Bodies corporate acting in a way that would render an individual liable to arrest, cease to retain their corporate character and become individually responsible. 1 *Burn* 267.

Generally a feme covert shall answer as much as if she were sole for any offence, not capital against the common law or statute. 1 *Hawk.* 3.

No place affords protection to offenders against the criminal law and they may be arrested any where whoever they may be. *Bac. Abr. Trespass, D. 3.*

or grand inquest before the justices of goal-delivery. 3 E. 3. *Coron.* 299. But if it were a vill not inclosed; there if a murder were committed within the precinct of the vill, tho' in the field, and the murderer not taken, if it were done in the night, the vill should not be amerced; but if it were in daylight, tho in the evening, the town should be amerced. 3 H. 7. *cap.* 1. 3 E. 3. *Coron.* 293.

And the same law is if the killing were by a man by misadventure, if he escapes and be not taken. 3 E. 3. *Coron.* 302. for tho by the statute of *Marlebr. cap.* 26. that common fine or amercement called *murdrum*(*) was not to be imposed in cases of death *per infortunium*, yet the amercement called *escapium* took place even in that case. *Vide Bracton, Lib.* III. *cap.* 15.

If the malefactor were taken by the township, and delivered to the sheriff or his bailiff, or to the gaoler of the county, and then an escape happen, the township is not chargeable, but the sheriff or bailiff. 3 E. 3. *Coron.* 337.

But if he be in guard of the constable, and the constable is bringing him to the gaol, yea tho the gaoler refused to take him, if he escapes, it is a charge upon the vill. 3 E. 3. *Coron.* 346. 10 H. 4. 7. a. *Escape* 8. *per Gascoigne*; nay, tho in the flight he be slain for necessity of retaking him because he resists, yet it is an escape upon the vill. 3 E. 3. *Coron.* 328.

And in case the vill be not sufficient to answer the amercement, the hundred shall be charged therewith, and in default of the hundred, the county; and if the killing be out of any vill, the hundred is amerceable for the escape. 8 E. 3. *Coron.* 425. *Stamf. P. C. Lib.* I. *cap.* 31. f. 34. b.

But this is only in case of felony touching the death of a man, for there the fact is apparent, that the man is slain; but in case of other felony, as theft, there tho the thief be not [74] taken, no amercement lies upon the town, nor other penalty at common law, but by the statute of *Winton, de quo infra*.

But if they had a felon in their custody, or in the custody of the constable, and he escape, the vill had been amerceable, and so is the hundred, if they have him in their custody, or in the custody of the constable of the hundred, and suffer him to escape. 3 E. 3. *Coron.* 316.

The law used in the time of H. 3. when *Bracton* wrote, appears *Lib.* III. *cap.* 10. to be thus: if a man had committed manslaughter either by misfortune or otherwise, if he fled, and

(*) *Vide Part I. p.* 39. 425. 447.

the jury were inquired of by the judge if he were in *decennā*, then the *decenna* was to be amerced by the court, because they had him not there; if he were not in any *decenna*, then the vill was to be amerced; because they received him an inhabitant, and had him not in *franco plegio*; for every one above twelve years old ought to be in frank-pledge, except clergymen, noblemen, and knights and their families: (*) and therefore in the case of clergymen, noblemen and knights, if any of their family *de manupastu* committed a murder or manslaughter, the clergyman, nobleman or knight was amerced if the malefactor fled, unless some special custom had abrogated it, as in *Hertfordshire*: and thus did the practice long after continue: vide 8 E. 2. Coron. 428. *Si serviens alicujus domini in servitio suo existens facit feloniam & convincatur, quamvis post feloniam ipsius non receptavit, amerciandus est*; and 3 E. 3. Itin. North'ton, Coron. 203. It was presented, that *A.* had killed *B.* and it was demanded of the presenters, whether he were in *decennā*? They answered, *He was not*? Then it was demanded where he abode? They say with the parson of the town; and thereupon the parson was amerced for his *manupast*. Then it was demanded who was present when he slew him? They say *C.* It was then demanded of them, whether *C.* received him [took him?]. They say *Not*; wherefore *C.* was amerced. Then it was demanded where the felon was? They say *he is escaped*; then it was demanded whether it were done in the day or the night? They answer *in the evening*; therefore the whole vill was amerced.

Several things are observable in this case. 1. That if he had been in *decennā*, the *decenna* had been [75] amerced, because they had not him present *ad standum recto in curiā*. 2. That because the parson nor his family were not by law to come to the view of frank-pledge, he was amerced for one that was of his family, one *de manupastu*. 3. That he that was present and took not the offender, was also amerced. 4. That because the felony was committed in the day-time, and the felon escaped, the whole vill was amerced, 22 E. 3. Coron. 238. so in effect three amercements for one escape.

And note, that according to *Bracton, ubi supra*, he is *de manupastu, qui est ad victum & vestitum, or ad victum cum mercede*, as a household servant; and according to the antient law, he that entertained a man three nights, made him to be *de manupastu*.

This law of amercing the *decenna*, or him of whose family

(*) Vide Part I. p. 65. in notis.

an offender is, is not abrogated, but yet it is not now used; but it was certainly a most excellent constitution, whereby every man was under the pledge of his master or father, with whom he lived, or must be within some *decenna* that may see him forthcoming: *vide Spellman in Glossar. Titul. Friburg & Leges Edvardi, cap. 19. 20.(a.)*

As thus the vill is answerable for an escape, so is he that is present when a manslaughter or murder is committed, and doth not do his best endeavour to apprehend the malefactor, though he were not party or accessory to the crime; with this agrees 8 *E. 2. Coron.* 428. before-mentioned, where it is called only an amercement; but 8 *E. 2. Coron.* 395. he that was of full age, that was present when a manslaughter was committed, *et ne leva le maine d' attach le felon*, was committed to prison, till he made fine to the king, but he that was within age was discharged. (b)

And tho in the book of 14 *H. 7. 31. b.* a person indicted for being present at a felony, without saying he was aiding and abetting, was discharged, it was because the indictment there was with intent to make him a felon, and not to charge him with a misdemeanor for not pursuing the felon: *vide* [76] *Co. P. C. p. 117.* It is a misdemeanor, for which the party shall be fined and imprisoned.

By that which hath been said, it appears, that the apprehending of a felon is in many cases a duty, and not arbitrary, even in cases of a private person, without any other warrant than what the law gives, and that the omission thereof is a misdemeanor, and punishable by fine or amercement. [2]

And now therefore I come to consider touching the arrests by a private person in case of felony.

And this is of these kinds. 1. Where the party arrested hath really committed a felony, and this is known to the party arresting. 2. Where the party arrested hath really committed a felony, but it is only suspected, and not certainly known to the party arresting. 3. Where there hath been a felony committed, and the party arresting doth, upon probable grounds, suspect the person arrested to have committed it, tho in truth he did it not.

I. As to the first of these, where a person hath committed felony, and *A.* knows it. [3]

(a) *Wilk. Leg. Anglo-Sax. p. 201.*

(b) *Vide Part I. p. 21.*

[2] *Phillips v. Trull*, 11 *Johns.* 486; *R. v. Hunt*, 1 *R. & M. C. C.* 93.

[3] *Quere*, whether an arrest may be made without warrant for such a misdemeanor as receiving stolen goods knowing them to have been stolen. *Wakely v. Hart*, 6 *Binnay*, 316.

It is true in this case, if the time and nature of the fact, and the condition of things will bear it, it is best to complain to a justice of peace, and have his warrant for the apprehending of him; [4] or if that cannot be had in convenient time, then to call to his assistance the constable; but such the case may be, that the delay that must arise necessarily by these solemnities, may give the felon opportunity to escape; and therefore in this case *A.* without any other authority than what the law gives him, may arrest or apprehend the felon; and if he cannot do it by his own strength, he may call others to his assistance, or raise hue and cry for his apprehension; and if he doth not thus, he is punishable, as is above declared, if it can appear that he knew it. [5]

And it will be all one, whether the felony were committed in the same county, or in any other county; for the law in this case makes *A.* an officer; and this was antiently the law, and still is. Bracton Lib. ult. in fine, in criminalibus causis, ubi sequi debet capitale supplicium, vita videlicet vel mutilatio membrorum, non sequitur attachiamentum ali- [77] quod, sed corpus talis, quicumque ille fuerit, ab omnibus arrestetur, qui sunt ad fidem domini regis, sive inde præceptum habuerit, sive non habuerit; and accordingly it is ruled, 10 *E.* 4. 17. *b.* that it is a good justification for a man in an action of false imprisonment to say, that the plaintiff committed a felony, and shew what, and the defendant arrested him, and delivered him to the constable, or he might have brought him to gaol by himself or his servant, as is there agreed.

But the safer way is, to bring him before a justice of peace, who may examine and commit him.

And as a private man may do thus upon a felony commit-

[4] *West v. Smallwood*, 3 *M. & W.* 418; *Leigh v. Webb*, 3 *Exp. Rep.* 166; *Balk v. Broadbent*, 3 *T. R.* 185; *Boote v. Cooper*, 1 *T. R.* 535; *Fox v. Gaunt*, 3 *E. & Adol.* 798 per *Ld. Tenterden*.

[5] As to the arrest of offenders by private persons of their own authority, permitted by law for inferior offences; it seems clear, that regularly no private person can of his own authority arrest another for a bare breach of the peace after it is over; for if an officer cannot justify such an arrest, without a warrant from a magistrate, surely *a fortiori* a private person cannot. It hath been adjudged that any one may lawfully apprehend a common notorious cheat, going about the country with false dice, and being actually caught playing with them, in order to have him before a justice of peace; for the public good requires the utmost discouragement of all such persons, and the restraining of private persons from arresting them without a warrant from a magistrate would often give them an opportunity of escaping; and from the reason of this case it seems to follow, that the arrest of any other offenders by private persons, for offences in like manner scandalous and prejudicial to the publick, may be justified. 2 *Hawkins*, 77.

ted, so if he see danger of murder by a dangerous wound given, he may pursue the offender.[6] 7 E. 3. 16. *Barre* 291.

And in both these cases, he may break open doors,[7] if he be denied entrance, and if *de facto* the felon or malefactor be there, for the law makes him an officer in this case, as well as if he were a justice of peace or constable. 7 E. 3. 16. *b*.

Nay yet farther, if the felon resists or flies, so that he cannot be taken without killing him, this is justifiable, and no felony; but still it must be where he cannot be otherwise taken, for it is for advancement of justice, and suppression of felons, and therefore if they cannot be otherwise apprehended, it is lawful, as well as if *A.* were a constable, or had a warrant; and if the books that speak of this matter, be but carefully examined, it will appear that the law was so generally taken, tho he were pursued or taken without any formal process to the sheriff, and that as well before an arrest made, as after; and this appears *in terminis*, 22 *Assiz.* 55. 3 E. 3. *Coron.* 346, & 328, & 290. but indeed the books of 3 E. 3. *Coron.* 288, 289. are of a constable and watchman: but in 3 E. 3. *Coron.* 349. the townsmen that did it were fined 40s. but it seems it was more for the escape than the killing: *vide Stamsf. P. C. Lib. I. cap. 6. f. 13. q. b. accordant.*

As to the statutes of *Magna Charta*, *cap. 29.* 25 E. 3. *cap. 4.*

28 E. 3. *cap. 3.* 42 E. 3. *cap. 3.* they do not at all concern this preparatory imprisonment of a felon, as shall [78] be shewn in due time; and therefore whatsoever hath been before said holds true in the first instance of his imprisonment, tho the party be not yet indicted.

[6] A private person cannot of his own authority arrest a person who has been engaged in an affray or breach of the peace. *Price v. Seeley*, 10 Cl. & Fin. 28; *Phillips v. Trull*, 11 Johns. 486. But during the affray any person may without a warrant from a magistrate restrain any of the offenders in order to preserve the peace. *Ib.* *Knot v. Gay*, 1 Root, 66.

At common law a master has a right to take up his runaway servant, and for this may enter peaceably into any house unless forbidden by the owner. An advertisement for the apprehension of a runaway servant gives the same authority to apprehend him that the master possesses; but he who acts under it, does so at his peril, that the advertisement is genuine and that its publisher had authority. *Pennsylvania v. Kerr*, *Addison*, 325.

A citizen of one State from which his slave absconds into another State, may pursue and arrest him there without warrant and use all the force necessary to carry him back. *Johnson v. Tomkins*, *Baldwin*, 571. And this on Sunday, in the night time or in the house of another, if no breach of the peace be committed. And a magistrate cannot order the master to be arrested without oath, warrant and probable cause. *Ib.*

[7] Any person may justify breaking and entering a party's house and imprisoning him, to prevent him from murdering his wife, who cries out for help. *Handcock v. Baker*, 1 B. & P. 260.

II. As to the second case, *viz.* where a felony is committed by *B.* but *A.* that arrests him, doth not certainly know it, as not being present at the committing of it.[8]

I take the law to be all one with the former case, only wha he doth herein, he doth at his peril; for if in truth *B.* be a felon, then *A.* may arrest him, and may break a house to arrest him, if ha be within the house, and refuses to render himself; yea, and if he will not suffer himself to be taken, he may in case of necessity be killed; but this still is at the peril of *A.* for if he be no felon, it may be manslaughter at least in *A.* if he doth it.

But how far forth this will be justifiable in case that *A.* hath a good cause of suspicion, will be considerable in the next inquiries.

III. The third case is, there is a felony committed, but whether committed by *B.* or not, *non constat*, and therefore we will suppose, that in truth it were not committed by *B.* but by some person else, yet *A.* hath probable causes to suspect *B.* to be the felon, and accordingly doth arrest him; this arrest is lawful and justifiable,[9] and the reason is, because if a person should be punished by an action of trespass, or false imprisonment for an arrest of a man for felony under these circumstances, malefactors would escape to the common detriment of the people.

But to make good such a justification of imprisonment, 1. There must be in fact a felony committed by some person; for were there no felony, there can be no ground of suspicion. Again, 2. The party, (if a private person,) that arrests, must suspect *B.* to be the felon. 3. He must have reasonable causes of such suspicion, and these must be alledged and proved.

1. There must be a felony done;[10] and therefore if a man be taken for suspicion of felony, and delivered to the constable, or remains in the custody of him that took him, yet if in truth no felony were committed, he may be let go at large, and no

[8] *Holley v. Mix*, 3 *Wend.* 350; *Wrexford v. Smith*, 2 *Root*, 371.

[9] *Ledwith v. Catchpole*, *Cald.* 291; *Adams v. Moore*, 2 *Selw. N. P.* 910; *Holley v. Mix*, 3 *Wendell*, 350; *Wakely v. Hart*, 3 *Binney*, 316; *Com. v. Deacon*, 8 *Serg. & Rawle*, 49.

[10] 3 *Wendell*, 350; 3 *Binney*, 316; 8 *Serg. & Rawle*, 49, *ut supra*. If he conducts himself in a manner to excite suspicion, this only goes in mitigation of damages if it turns out that no felony was committed. *Cowley v. Dunbar*, 2 *C. & P.* 565.

Evidence is admissible in mitigation of damages that the defendant had ground to suspect that the plaintiff was guilty of the offence for which he was arrested. *Rogers v. Wilson*, *Minor*, 407.

punishment shall ensue for the escape. *Kelv.* 34. a. b. But if a felony were committed, though he that is taken for the suspicion thereof be in truth innocent, and it so appears to the constable, or him that arrests him; yet if he let him go before he be indicted, and acquitted or delivered by proclamation before the justices of gaol-delivery, the party letting him go shall be punished for an escape. 44 *Assiz.* 12. *Poulton de Pace*, f. 146. b. 5 *H.* 7. 4. 7 *H.* 4. 35. a.

2. The party that arrests him, must be he that suspects him, and regularly it cannot be done by another; and therefore if a man justifies in false imprisonment for suspicion, he must justify it as his own act, and not by the command of the sheriff or other officer, nor can another justify by the command of him that so suspects. 11 *E.* 4. 4. b.

But this doth not always hold true; for an officer of justice, may, in assistance of him that suspects, justify the imprisonment; as a constable, upon a complaint made to him by him that suspects, may justify; but he must allege his justification in the same manner as he that suspected ought, *viz.* a felony done and cause of suspicion; and therefore the party suspecting and desiring the constable's assistance must acquaint him with the whole matter, and the causes of his suspicion, otherwise he is not bound to assist him. 2 *H.* 7. 15. b. And in like manner a justice of peace being applied to by him that suspects and acquainted with the whole circumstances of the case. (*)

And this appears beyond dispute even by the statute of 34 *E.* 3. cap. 1. whereby power is given to the justices of peace to arrest all those whom they find by indictment or by suspicion, and to put them in prison.

And the reason is apparent, namely, the justices of peace are made judges of the reasonableness of the suspicion, and when they have examined the party accusing touching the reasons of their suspicion, if they find the causes of suspicion to be reasonable, it is now become the justice's suspicion as well as theirs, and accordingly adjudged, *P.* 43 *Eliz.* C. B. *Croke*, n. 35. *Tatum's case*, (c) and therefore the saying of my lord *Coke*, 4 *Instit.* p. 177. "That notwithstanding such warrant, [80] or the aid of the constable upon such complaint, it is still the party's arrest, and not the constable's or justice's, and that he must be present, and that he cannot break open a door by virtue of such warrant," is neither warranted by the law nor the common practice;* and in the book of 2 *H.*

(*) *Vide Part I. p. 580.*

(c) *Cro. Eliz.* p. 829.

* *Vide Part I. p. 579.*

7. 15. *b.* where one justified in aid of the constable upon a felony done, and a suspicion and cause thereof, *ut infra*, it was ruled a good justification against the opinion of *Bryan*; and it is apparent by the statute of 5 *E.* 3. *cap.* 14. "If any person hath any evil suspicion of persons to be robberds-men, wasters or draw-latches, they shall be incontinently arrested by the constables of the town, be it by day or night; and if they be arrested within franchises, they shall be delivered to the bailiff of the franchise; if in the gildable, to the sheriff, and kept in prison till the coming of the justices."

The suspicion may be by any person, yet the imprisonment must be by the constable; and the reason is that which is given before, because the constable is a proper officer, to whom complaints of this nature may be made.

And therefore if a felony be committed upon the goods of *A.* and the goods be found in the custody of *B.* and *A.* comes to a constable and shews him the case, and requires him to bring him before a justice; this is a good justification by *A.* in false imprisonment brought against him without so much as an averment, that he suspected him. *H.* 4. *Car. Rot.* 513. *Marbery* and *Porter*, *B. R.* vide 2 *E.* 4. 8. *b.*

But it is true, that he that is not an officer cannot justify by the command of him that suspects, if he also be no officer; and so are the books of 5 *H.* 7. 5. *a. per Cur.* 12 *Co. Rep.* 92. Sir *Antony Ashley's* case, 11 *E.* 4. 4. *b.*

But then the case is easily solved, for if a felony be committed, and *A.* hath probable cause to suspect *B.* and accordingly suspects *B.* and acquaints *C.* with the whole matter, *C.* upon this having probable cause to suspect *B.* tho he cannot justify the imprisonment of *B.* as by the command of *A.* that first suspected him, he may justify by his own suspicion; and the like of him that comes in aid of *A.* to arrest *B.* 5 *H.* 7. 4 & 5.

3. The third thing to be observed in this arrest by a private person upon suspicion is, that he hath a probable cause of suspicion. [11]

And these probable causes are very many, as for instance common fame, 5 *H.* 7. 4. *b.* 2 *H.* 7. 15. *b.* 11 *E.* 4. 4. *b.* & *c.* hue and cry levied, 21 *H.* 7. 28. hath part of the goods found upon him, or be indicted of the like, 12 *Co. Rep.* 92. *Ashley's*

[11] The question as to what is a reasonable and probable ground for suspicion is a mixed proposition of law and fact. Whether the circumstances alleged to show it reasonable or not are true and existed and the inferences drawn from them warranted, is a matter of fact for the consideration of the jury; but whether supposing them true, they amount to a reasonable ground for suspicion, is a question of law for the opinion of the judge. *Panton v. Williams*, 1 *G. & D.* 504; 2 *Ad. & Ell. (N. S.)* 69.

case, party with him that committed the robbery. 7 E. 4. 20. a.

And *note*, that the law hath that care, that malefactors, tho but suspected, should be apprehended, that a man may alledge twenty causes of suspicion, and it shall not make his plea double, for one answer makes an issue upon the whole, *viz. de injuriâ suâ propriâ absque tali causâ*, and no issue shall be singly taken upon one cause of suspicion, where many causes are thus alledged. 2 E. 4. 8 & 9. 7 E. 4. 20. a.

Now what is to be done by a private person, that thus arrests a party upon suspicion of felony; if after such an arrest the party arresting discharge him without bringing him to a justice or constable, he shall be punished for the escape at the king's suit, but it makes not the imprisonment unlawful as to the party. 10 E. 4. 17. b.

Or he may carry him to the gaol, and if the gaoler receive him, he that made the arrest is discharged, 10 E. 4. 18. a. but he must not carry him to a gaol of any other county than where he is taken, unless either there be no gaol in the county, or that he cannot for the danger of rebels bring him to that gaol. 11 E. 4. 4.

Or he may deliver him to the constable of the vill, and that is a sufficient discharge. 10 E. 4. 17. b.

But the proper way is to bring him to a justice of peace, who may commit, or discharge, or bail him, as the case requires.

Yet if the party so arrested be sick and cannot be removed without danger of death, he may detain him in his own house, till he can reasonably bring him to a justice or officer. 2 E. 4. 8. b.

The arrest of a man upon suspicion of felony by a [82] private person is, as before is said, a thing permitted by law and therefore justifiable; but it is not a thing commanded by law, neither is the party punishable, if he omit it, as in case where it is a known felony, or where done upon hue and cry levied, or by an officer, or by a precept; for no man is judge of a man's suspicion but himself. (*)

And therefore there is not the same privilege in all points allowed to him that arrests upon suspicion, as to him that arrests upon hue and cry, or by warrant, or where he is present at the felony committed, and so knows it.

1. It seems he that arrests as a private man barely upon suspicion of felony, cannot justify the breaking open of doors to arrest the party suspected, but he doth it at his peril, *viz.* if in truth he be a felon, then it is justifiable, but if he be innocent, but upon a reasonable cause suspected, it is not justifiable, 4 Co.

(*) *Vide Part I. p. 490.*

Instit. p. 177, 178. (but yet to prevent a murder or manslaughter a private person may break open a door, 12 *H. 8.* 2. *b.*) but he may enter by the doors open, and make the arrest in the house.

But *note*, that in all arrests he must acquaint the party with the cause of his arrest.

But in case of a known felony done by the party, or where a felony is done, and a constable comes and demands entrance upon a complaint to him, or by a justice of peace's warrant, or upon hue and cry; there the doors may be broken open upon notice and demand of entrance and refusal,

2. Again, if there be a felony committed by *B.* and *A.* is present and sees it, and pursues the felon, and he cannot be otherwise taken, and *A.* kills him in the pursuit, tho he have not arrested him, the law justifies him; and possibly the same law may be in case of an officer, a warrant, or hue and cry, tho the person be not guilty of the fact, if he refuses to submit to the arrest; but *de hoc infra*.

But if a felony be committed, and *A.* upon probable cause suspects *B.* to have been the felon, tho the law permits him to arrest *B.* tho in truth innocent, yet he cannot justify the killing of him upon his flight and refusing to submit, [83] *justiciari se permitttere nolens*; but if he kills him, it is at his peril; for if *B.* be innocent, it is at least manslaughter, *Co. P. C.* p. 56. 221. 22 *Assiz.* 55. and the reason is, because *B.* is not bound to take notice of *A.* as authorized to arrest him, as being no officer, nor having any warrant; it is true, a constable arresting in the king's name, or offering so to do, the party is bound to take notice and submit[12] as hath been said, *Part I. cap.* 37. but a mere stranger offering to do it, a man is not bound to take notice of his authority, and therefore may fly from him if innocent, for possibly he may think he came to rob him.

3. Yet farther, if an innocent person be actually arrested upon suspicion by a private person, all circumstances being duly observed, and he breaks away from the arrest, yet I do not think the person arresting can kill him, tho he cannot be otherwise taken, for the person arrested is not bound to take notice of that authority that the law gives to a private person in this case.

But then can he justify the beating or striking of him in case

[12] Before a private person interferes to prevent a breach of the peace as an affray he is bound to notify his intention of so doing, otherwise the parties engaged may imagine that he comes to act as a party. *Foster*, 311.

When the circumstances are such that a person must know why a man is about to apprehend him, he need not be told why; and the arrest will be legal and the resistance illegal as much as if he had been told. *R. v. Howarth*, *R. & M. C. C.* 207.

he cannot otherwise take him that thus makes the assault? As where a bailiff of the sheriff by warrant arresteth a person, tho he cannot strike or beat him before the arrest to take him; yet after the arrest and escape such bailiff may justify his beating, if he cannot otherwise retake him according to the opinion of the book, 2 *E.* 4. 6. *b.*

And it seems he cannot, but only lay his hands gently upon him to lay hold of him for the reason before given.

4. But then suppose that either before the arrest or after the arrest, *B.* draws his sword and assaults *A.* and *A.* presseth upon him either to take or detain him, and in the conflict *B.* kills *A.* is it murder in *B.* or if *A.* kills *B.* is it justifiable and no felony in *A.*?

If the bailiff of a sheriff is about to take a prisoner, and before he takes him the party draws his sword and kills him, this is murder, as is before said, *Part I. cap.* 37. And on the other side, if either after or before the arrest the bailiff upon assault made upon him kills the party, this is no felony, neither [84] is he bound to give back to the wall. *Co. P. C.* p. 56 & 221.

It seems, that if the party arrested kills him that thus arrests upon suspicion, (always supposed the party killing is innocent,) this is but manslaughter and not murder; and on the other side, if the party arresting kills the party arrested or intended to be arrested by him upon suspicion, that this is manslaughter; and tho the arrest in this case had been lawful, yet the party arresting hath not the same privilege, as in case of killing a man upon hue and cry, tho the party arrested after the arrest, or upon the attempt of the arrest, assaulted him that arrested him or attempted to arrest him. 1. Because in this case, tho the law impowers the party to arrest him, yet it is but a power of permission, not an injunction by the law; neither is he punishable if he had not made such an arrest; and so not like the case of an arrest by an officer, warrant of a justice, hue and cry, where it is a duty to arrest, and the party, that omits his duty in this case, is punishable by fine and imprisonment for his omission. 2. Because he might have had a legal warrant from a justice of peace, or called an officer to his assistance, and then he had been under a more effectual protection of the law in what he did in pursuance of his duty. 3. It would give too great a latitude for persons to be their own judges in this case, and to take away a man's life who is innocent, and possibly might not have sufficient assurance, that either a felony had been committed, or that he that arrests had a just or lawful cause of suspicion.

And it seems the law is the same, whatsoever the cause of suspicion were, yea altho the person were indicted for the

offence,[13] because a person innocent may be indicted, and because there is another way to bring him into an answer, namely process of *capias* to the sheriff, who is a known responsible officer. 3 E. 3, *Coron.* 346.

And thus far concerning arresting by a private person upon suspicion.

CHAPTER XI.

[85]

CONCERNING ARRESTS OR APPREHENSION OF FELONS, OR PERSONS SUSPECTED OF FELONY BY AN OFFICER.

THERE are certain officers and ministers of public justice, that *virtute officii* are empowered by law to arrest felons, or those that are suspected of felony, and that before conviction, and also before indictment.

And these are under a greater protection of the law in execution of this part of their office upon these two accounts.

1. Because they are persons more eminently trusted by the law, as in many other acts incident to their office, so in this.
2. Because they are by law punishable, if they neglect their duty in it.

And therefore it is all the reason that can be, that they should have the greatest protection and encouragement in the due execution of their office, since their actings herein are not arbitrary but necessary duties, (not permissions,) and under severe punishments in their neglect thereof.[1]

And hence it is, that these officers, that are thus intrusted, may without any other warrant but from themselves arrest

[13] If an innocent person be *indicted* of a felony where in truth no felony was committed, and will not suffer himself to be arrested by the officer who has a warrant for that purpose, he may lawfully be killed by him, if he cannot otherwise be taken; for there is a charge against him upon record, to which at his peril he is bound to answer. 1 *Hawk. ch.* 28. § 12. For the arresting of the body of a man by a private person, there must be some just cause or some lawful and just suspicion at the least; and therefore when a man is *indicted* of felony, that is a good cause for any man to arrest him. *Dalton, ch.* 170. § 5. Where acting upon the fact of an *indictment* found, private persons cannot be truly said to act upon their own private suspicion or authority, and therefore they ought to have equal protection with the ordinary ministers of the law; at any rate it is a good cause of arrest by private persons, if it may be made without the death of a felon: and if the fact of his guilt be necessary for their complete justification, I conceive that the bill of indictment found by the grand jury would for that purpose be *prima facie* evidence of the fact till the contrary was proved. 1 *East*, 301.

[1] *Cowley v. Dunbar*, 2 O. & P. 565; *Crowther's case*, *Cra. Elis.* 654; *R. v. Wiat*, 1 *Salk.* 380; 2 *Ld. Raym.* 1189.

felons, and those that are probably suspected of felonies; and if they be assaulted and killed in the execution of their office, it is murder; and, on the other side, if persons that are pursued by these officers for felony or the just suspicion thereof, nay for breach of the peace or just suspicion thereof, as night-walkers, persons unduly armed, shall not yield themselves to these officers, but shall either resist or fly before they are apprehended, or being apprehended shall rescue themselves and resist or fly so that they cannot be otherwise apprehended, and are upon necessity slain therein, because they cannot be otherwise taken, it is no felony in these officers or their [86] assistants, that upon inevitable necessity kill them, tho possibly the parties killed are innocent, for by their resistance against the authority of the king in his officers, they draw their own blood upon themselves.

The officers that I herein principally intend are, 1. Justices of the peace. 2. Sheriffs. 3. Coroners. 4. Constables. 5. Watchmen. And when I mention these I also include all, that come in their aid and assistance; for every man in such cases is bound to be aiding and assisting these officers upon their charge and summons, in preserving the peace and apprehending of malefactors, especially felons.

And if any being thereunto called shall not give their assistance, they are to be punished by fine and imprisonment, and consequently are under the common protection of the law equally with the officers themselves.

And that was the reason of the statutes of 7 *Jac. cap. 5* and 21 *Jac. cap. 12*. that gave power as well to assistants of the most usual peace-officers, as to the officers themselves, to plead the general issue, and give the special matter of their justification in evidence, and allow double costs to the defendant.

Wheresoever a private person may arrest a felon or person suspected, there any of these officers may do it; but of this sufficient hath been said before: I therefore come to that power, that concerns them specially as officers in this case.

I. *Justices of peace* have a double power as in relation to arrest of felons; one upon complaint of another person, whereof hereafter, *cap. 13*. Another primitive and original in themselves, whereof at present.

If a justice of peace see a felony, or other breach of the peace, committed in his presence, he may in his own person apprehend the felon.[2]

[2] In case a magistrate has notice or a particular knowledge that a person has been guilty of an offence, yet it is not a sufficient ground for him to commit the criminal, but in that case he is rather a witness than a magistrate and ought to

And so he may by word command any person to apprehend him, and such command is a good warrant without writing; but if the felony or other breach of the peace be done in his absence, then he must issue his warrant in writing under his seal to apprehend the malefactor, 14 *H.* 7. 9. *b.* adjudged; and by *Fineux*, if there be any riot or breach of the peace like to happen by a tumultuous meeting, &c. he may [87] command his servants or others to prevent it by arresting the parties.

And *note*, that if the justice of peace hath either from himself or by a credible information from others knowledge of a felony done, and just cause of suspicion of any person, he may himself arrest and commit that person, 14 *H.* 7. 8. *per Keble*; and according to it are the express words of the statute of 34 *E.* 3. *cap.* 1. before mentioned.

II. Secondly, As to the *sheriff*, it is ordained by the statute of *Westminst.* 1. *cap.* 9. (a) "That all generally be ready and appointed at the commandment and summons of the sheriff, and at the cry of the country to sue and arrest felons, when any need shall be, as well within franchises as without, and they that will not so do, and thereof be attaint, shall make grievous fine to the king, and if default be found in the lord of the franchise, the king shall take the franchise to himself, &c. And if the sheriff, coroner, or bailiff, will not attach or arrest such felons there, as they may, or will not do their office for favour borne, to such misdoers, and be attaint, they shall have a year's imprisonment and after make grievous fine, if they have where-with, and if not three years imprisonment.

By this statute the sheriff is not only enabled but enjoined to arrest felons, and all persons are required to be assisting to him therein upon his summons; and they are punishable by fine and imprisonment in default thereof.

And altho the sheriff in his *Turn* had power to take presentments of felonies at common law, yet this was not intended barely of issuing precepts upon such inquisitions, but to a ministerial taking of felons as he was conservator of the peace, for his *Turn* was kept but twice in the year, but the occasions of taking felons were frequent.

And accordingly it was practised, *vide* 5 *H.* 7. 5. *a.* in *fine*,

(a) 2 *Co. Instit.* p. 172.

make oath of the fact before some other magistrate, who should thereupon act the official part by granting a warrant to apprehend the offender, it being more fit that the accuser should appear as a witness than act as a magistrate. *Per Pratt C. J. R. v. Wilkes*, 2 *Wilson*, 158. *Dalt. ch.* 116, § 3.

the sheriff arrested one suspected of felony, and no question of the lawfulness thereof.

III. *Coroners*: The coroners had no power of taking [88] inquisitions of any felony but the death of a man, as hath been shewn; and therefore by the express provision of the statute of 4 E. 1. *De officio coronatoris* he may not only make process but make hue and cry after them, yet by the statute of *Westminst.* 1. cap. 9. above-mentioned he is a conservator of the peace in relation to all felonies, and can command them to be apprehended, tho he can take no inquisition concerning any but the death of a man.

IV. For the office of *constable* it is of twofold extent. 1. Ministerial and relative to the justices of peace, coroners, sheriffs, &c. whose precepts he ought to execute, or in default thereof he may be indicted and fined. 2. Original or primitive, as he is a conservator of the peace at common law.[3]

[3] *Taylor v. Strong*, 3 Wendell, 384; *Comm. v. Deacon*, 8 Serg. & Rawle, 47; *Phillips v. Trull*, 11 Johnson, 486; *Mayo v. Wilson*, 1 N. Hamp. 53; *U. S. v. Hart*, 1 Peters, C. C. Reps. 392.

He cannot arrest for a mere assault unless present at the time of its commission, (unless a wound has been given and a felony is like to ensue.) *Coupey v. Henley*, 2 Esp. 540. Nor for an affray, *Cook v. Nethercote*, 6 C. & P. 741. Using loud words in the street is not an offence for which a party should be taken into custody. *Hardy v. Murphy*, 1 Esp. 294. May take into custody party interfering with his preventing a breach of the peace. *Levi v. Edwards*, 1 C. & P. 40. (but may not give a blow, *ib.*) Or any one joining in the offence. *Lewis v. Arnold*, 4 C. & P. 354. Suspicion that a person has on a former occasion committed a misdemeanor is no justification for taking him into custody without a warrant. *Fax v. Gaunt*, 3 B. & Ad. 789.

A constable may be justified in removing a person from a church for disturbing the congregation in time of divine service, although no part of such service was actually going on at the time, but he has no right to detain such person in custody afterwards for the purpose of taking him before a magistrate. *Williams v. Glenister*, 2 B. & C. 699. And it seems that the church wardens have the same power. *Burston v. Henson*, 10 M. & W. 105.

Any person may arrest another for the purpose of putting a stop to a breach of the peace committed in his presence; and there seems no difference between the power of an officer and that of a private individual in this respect. 2 Hawk. ch. 13, § 8. Care must be taken however that what had occurred did actually amount to a breach of the peace. When a man and his wife refused to go out of the shop of a baker and continued to abuse him in relation to an alleged overcharge, till a crowd of 100 to 150 persons collected round the shop and obstructed the public passage; it was held that the baker was justified in giving the man and his wife into custody and that their conduct amounted to a breach of the peace and trespass would not lie. *Cohen v. Huskisson*, 2 M. & W. 477; *Ingle v. Bell*, 1 M. & W. 516. But proof of annoyance and disturbance by a person present at a meeting, such as crying "hear, hear" and putting questions to a speaker and making observations on his statement, will not justify the chairman in giving such person into custody. *Wooding v. Oxley*, 9 C. & P. 1. Nor is it a sufficient plea to an action for false imprisonment, that the defendant was possessed of a house and that the plaintiff was there making a great disturbance therein and refused to depart when requested and was in a great heat and fury, ready and desirous to make an affray and cause a breach of the peace, whereupon the defendant gave the plaintiff into custody. *Wheeler v. Whiting*, 9 C. & P. 269; 1 Burn, 907.

By the original and inherent power in the constable he may for breach of the peace and some misdemeanors, less than felony, imprison a person.

If a man leaves an infant in the cold to the intent to destroy it, or charge the parish, the constable may take him and put him in the stocks. *M. 34 & 35 Eliz. B. R. Croke, n. 1. Beal and Charter, p. 287.*

So if a constable be assaulted by *A.* tho it be in his own case, he may imprison the party and carry him to gaol; but for opprobrious words, or a general hindrance of him to summon the trained bands to attend the lord mayor of London upon his precept, he cannot justify the imprisoning of a person in the *Compter, T. 31 Eliz. Rot. 1521. Fulwood and Gascoign;(c)* but he must bring him to a justice of peace: *nota*, in the justification it was also adjudged, that he assaulted him: *ideo quære* of that judgment.

And what may be done by a constable may be done by his deputy, for by the law a constable may make a deputy,[4] and he is within the statute of 7 *Jac. cap. 5.* to plead the general issue. *M. 13 Jac. B. R. Phelps and Winchcombe.(d)*

If *A.* menace *B.* to kill him, upon complaint thereof to the constable he may arrest him and put him into the stocks, till he find surety of the peace, 44 *E. 3. Barre [89] 202.* but that is intended, that he may detain him till he can conveniently bring him to a justice of peace and to avoid the present danger, for tho some of the old books seem to hold, that the constable may take sureties of the peace and detain a person till he gives him sureties, yet it cannot be by recognizance but by bond, and that for an affray or menace of breach of the peace done in his view. *H. 37 Eliz. B. R. Croke, n. 25. Sharrock and Hanmer.(e)*

If information be given to a constable, that a man and woman are in incontinency together, he may take the neighbours and arrest them, and commit them to prison to find sureties for their good behaviour, 1 *H. 7. a.* there the custom of London indeed is pleaded; but 13 *H. 7. 10. b.* adjudged,

(c) *Savil. p. 97.*

(d) *Moor p. 845.*

(e) *Cro. Eliz. p. 375.*

[4] Yet inasmuch as the office of a constable is wholly ministerial and no way judicial, it seems that he may appoint a deputy to execute a warrant directed to him, when by reason of sickness, absence or otherwise he cannot do it himself. For the public good requires that there should be always some officer at hand to execute such warrants, and the too rigorous restraint of the service of them to the proper officer, could not but sometimes cause a failure of justice; yet I do not find it settled that a constable can make a deputy without some such special cause. 2 *Hawk. ch. 10, § 36; Medhurst v. White, 3 Burr, 1259; R. v. Inhabit. of Hope Mansell, Cald. 252; R. v. Clarke, 1 T. R. 682.*

that it is a good justification for the constable or any in assistance to plead, that *A.* holds a messuage in the same vill, and she kept persons suspected of common bawdry, and the plaintiff suspiciously resorted to that house with women of ill fame, and that he arrested the plaintiff to find sureties for the good behaviour.

The constable may arrest suspicious night-walkers^(f) by the statute of 5 *E. 3. cap. 14.* and men that ride armed in fair or markets or elsewhere. *Stat. 2 E. 3. cap. 3. de Northampton.*

And it appears by the books before-mentioned, that in cases of arrests of this or the like nature, the constable may execute his office upon information and request of others,
[90] that suspect and charge the offenders, nay tho it be but with suspicion thereof.[5] 5 *E. 3. cap. 14. 13 H. 7. 10. b. 44 E. 3. Barre 202.*

But if there be an affray, tho to prevent it, or in the time of the affray the constable may upon information or complaint arrest the offender, yet it is held, that if the affray be past, and no danger of death, the constable cannot arrest the parties without a warrant from a justice of peace.[6] 33 *E. 3. B. Faux Imprisonment 6.*

(f) But then that suspicion must not be a mere causeless suspicion, but must be founded upon some probable reason; and so it was ruled in the case of the Queen and *Tooley, Mich. 1709.* for the murder of *Dent*, who was kild in aiding the constable, who had taken up a woman, that was walking the street upon suspicion, as being a woman of ill fame. *C. J. Holt* delivered the resolution of the court, that it was not murder, and gave this for one reason, "That it was not lawful even for a legal constable to take up a woman upon a bare suspicion only, having been guilty of no breach of the peace nor any unlawful act: and as to the case in 13 *H. 7. 10.* the reason thereof was, because it was in the view of the constable, who found her misdoing; that of late, constables made a practice of taking up people only for walking the streets, but he knew not whence they had such an authority." *MS. Rep.*

[5] It seems that a constable is not justified in apprehending and imprisoning a person on suspicion of having received stolen goods on the mere assertion of one of the principal felons. *Isaacs v. Brand, 2 Stark. Rep. 167.*

A warrant of arrest issued without any previous oath or affirmation, but reciting that it appeared to the judge issuing it, from "common rumour and report," that there was strong reason to suspect *A.* of issuing forged notes, is illegal, though it states that there was danger of his departing from the county before witnesses could be summoned to enable the judge to issue it upon oath. *Conner v. Com. 3 Binney, 38.*

[6] *Fox v. Gaunt, 3 B. & Ad. 798; Matthews v. Biddulph, 4 Scott, N. R. 54; 1 Dowd. N. S. 216, S. C.; Phillips v. Trull, 11 Johnson, 486; Knot v. Gey, 1 Root, 66.*

"It is clear that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled and his desire to break the peace has ceased, and then deliver him to a peace officer. And if that be so, what

But the law seems contrary, for tho in that case he cannot take surety of the peace himself, yet a upon complaint to him he may arrest the party to bring him before a justice to find surety of the peace, or for appearance. 44 E. 3. *Barre* 202. 35 *Eliz. Sharrock's case*.

Now as touching the constable's power of arresting *ex officio* in relation to felonies[7] it may come under these considerations, 1. What his power is to arrest when a felony is *certainly* committed. 2. What his power is to arrest in cases of *suspicion* of felony. 3. What his power is in case of *danger* of felony, tho none be committed, as in case of affrays or dangerous wounding.

1. As to the first of these, where a felony is committed, it is of all hands agreed, that he may *ex officio* arrest and imprison the felon till he can conveniently be conveyed to a justice of peace or the common gaol.

And it will be all one, whether the felony were committed in the same vill, or in any other vill or county, if the felons be within the vill where he is constable.

And this appears clearly by the books of 2 H. 7. 15. b. 7 E. 4. 20. a. and divers others, and by the statute of *Westm.* 1. cap. 9. 5 E. 3. cap. 14.

And in that case it is on all hands agreed.

1. That he may break open doors to take the felon, if the felon be in the house, and his entry denied after demand and notice that he is constable.[8]

reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is, that for the sake of the preservation of the peace, any individual, who sees it broken, may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together, who have committed acts of violence and the danger of their renewal continues, the affray itself may be said to continue, and during the affray the constable may not merely on his own view, but on the information and complaint of another, arrest the offender, and of course the person so complaining is justified in giving the charge to the constable." Per *Parke, B.* in *Timothy v. Simpson*, 1 C. M. & R. 762; 1 *Burn*, 907.

It is difficult to find any instance where a constable hath any greater power than a private person over a breach of the peace out of his view; and it seems clear that he cannot justify an arrest for any such offence without a warrant from a justice of peace. 2 *Hawkins*, 81.

[7] It seems difficult to find any case where a constable is empowered to arrest a man for a felony committed or attempted in which a private person might not be well justified in doing it; the chief difference seems to be that the constable has the greater authority to demand the assistance of others. 2 *Hawkins*, 80.

[8] But the breaking an outer door is in general so violent, obnoxious and dangerous a proceeding that it should be adopted only in extreme cases where an immediate arrest is requisite. 1 *Burn*, 978.

2. That if in such an attempt of arrest the constable or any that come in his assistance be kild after competent notice that he is constable, it is murder.

3. That if the felon resist and cannot be taken, [91] whether it be after the arrest or before, the killing of the felon, who cannot be otherwise taken, is no felony.

And the reason of all this is, because he is *ex officio* a conservator of the peace, and is not only permitted but by law injoind to take a felon, and if he omits his duty herein, he is indictable and subject to a fine and imprisonment.

And it is not material, whether he saw the felony committed, or hath it only by complaint or information; for as well in one case as the other he is bound to apprehend the felon, and make search after him within the limits of his jurisdiction, and to raise *hue and cry* upon him; and certainly what may be done upon *hue and cry* raised upon a felon may be done by that constable who upon the first complaint raiseth it; and the law gives him protection in the execution of his office, and will never punish him in the necessary pursuit of what it enjoins him.

And with this all the before cited books in the precedent chapter do agree; for I have before therein determin'd, that in this case a private person may kill a felon, who is really such, if he cannot otherwise be taken; *vide supra*, p. 77.

2. I come to the *second*, namely what if there be a felony done, (suppose a robbery upon *A.*) and *A.* suspects *B.* upon probable grounds to be the felon, and acquaints the constable with it, [9] and desires his aid to apprehend him; in this case I say,

1. That the constable may apprehend *B.* upon this account, tho the suspicion arise in *A.* at first; and with this agree the statutes of 3 *E.* 1. *cap.* 9. and 5 *E.* 3. *cap.* 14. and the books of 2 *E.* 4. 9. *a.* 5 *Co. Rep.* 91. *b.* *Semain's case*, *Dalt. cap.* 109. p. 292. 13 *E.* 4. 9. *a.* *accords* 2 *H.* 7. 15. *b.* tho *Brian* be to the contrary; but there are to be these circumstances to accompany it, 1. *A.* the person suspecting ought to be present, for the justification is, that he did aid *A.* in taking the party suspected, 2 *H.* 7. 15. *b.* He ought to inquire and examine the circumstances and causes of the suspicion of *A.* which tho he cannot do it upon oath, yet such an information may carry [92] over the suspicion even to the constable, whereby it may become his suspicion as well as the suspicion of *A.*

[9] *Ledwith v. Catchpole*, *Cald.* 291; *Davis v. Russell*, 2 *M. & P.* 590; *Nicholson v. Hardwick*, 5 *C. & P.* 495.

And if the constable should not be allowd this latitude in cases of this nature, many felons would escape, and the party arrested hath no prejudice thereby, for the justice of the peace, to whom in such cases he is properly to be brought, may consider the circumstances, and possibly in some cases discharge or bail him, and upon his trial, if innocent, he will be discharged. 3. But there must be a felony in fact done, and the constable must be ascertained of *that*, and aver it in his plea, and it is issuable.[10]

2. Consequently, if the constable upon such an arrest or attempt thereof be kild, it is murder as well as in the former case.

3. That in such case, if the supposed offender fly and take house, and the door will not be opened upon demand of the constable and notification of his business, the constable may break open the door, tho he have no warrant.[11] 13 E. 4. 9. a. for it is a proceeding for the king by persons by law authorized, and therefore there is virtually a *non omittas* in the actings of their authority.[12]

And the reason of the difference between private persons arresting upon suspicion and constables is, 1. Because that in the former case it is but a thing permitted to private persons to arrest for suspicion, and they are not punishable if they omit it, and therefore they cannot break open doors; but in case of a constable he is punishable if he omits it upon complaint. 2. Because it would be a great inconvenience if every private man upon pretence of suspicion should break open houses, for they may not be of known value or responsible; but a constable is an officer known within the vill, and his authority known, and is presumed of sufficiency, for he is chosen by the leet, like a bailiff *jurus & conus*, who need not shew his warrant. (*)

(*) Vide Part I. p. 461.

[10] A constable having reasonable cause to suspect a person of felony may arrest him without warrant, though it after appears that no felony was committed. *Samuel v. Payne*, 1 Doug. 359; *Beckwith v. Philby*, 6 B. & C. 35; *Hobbs v. Brandcomb*, 3 Camp. 430.

[11] A private person does so at his peril, his justification depends on his success. *Ante* 82.

[12] Sir William Russell (1 Russell on Crimes p. 629) quotes the text here as authority for a doctrine, which he considers that later authorities have varied from viz. that a constable may upon suspicion without warrant *break open doors* to make an arrest. There is a qualification in the text which would seem important, to wit, that it is in pursuit after flight; "if the supposed offender fly and take house," &c. still the subsequent reasoning of Lord Hale in the text above, and what he says on the same subject Vol. I. p. 583, look as if he did not consider this qualification of the case put essential. See 2 Hawk. ch. 14. §. 7.

Again it seems to me, that if a person thus charged with suspicion of felony upon just grounds of suspicion, and where a felony is actually committed, tho he be innocent, [93] yet if he resist the officer after notice that he is the officer, and assault him, if the officer kill him, it is no murder.

But it may be more questionable, whether if he fly and cannot be apprehended, the officer may kill him, where he is suspected and innocent, if he cannot be otherwise taken, as he may a felon, as before is shewn, *p. 77.* but it seems he may, and it is no felony no more than in the former case, for these reasons, 1. Because the constable is obliged to do his office in case of a probable suspicion, as well as in case of an actual felony. 2. Because he cannot judge, whether the party be guilty or not, till he comes to his trial, which cannot be till he be apprehended. 3. Because the party draws upon himself this inconvenience, and makes himself suspected by his very flight from the known officer.

And this is the reason why, tho a man be innocent of a felony committed, yet if he fled for it, and *that* be presented by the coroner, or found by the jury *that* acquits him of the felony, yet he forfeits his goods, because it was his own fault that he did not *stare juri*, and brought upon himself the just cause of suspicion, and put the country to trouble and hazard in pursuing him.

And yet it is true, that if the felon were not once in the hands of an officer that had warrant to arrest, as if he be in the house, and fly out at a back-door before the officer seizeth him, this is not an escape in the officer, *27 Assiz. 9.* But on the other side it may be said, that is nevertheless an escape in the township, for which they shall be amerced, tho the person were never actually taken; *quod vide supra, cap. 10.*

And therefore it is at the peril of the whole vill, if they take not a felon, (*) and when he is upon probable cause suspected, he is presumed to be such, till the contrary appear upon his trial.

And therefore, as before is said, a justice of peace cannot discharge a person brought before him but for suspicion of felony, in case a felony were committed, but must either bail or commit him.

And upon the reason before given it seems, that if a [94] person be charged to the constable for felony, or suspicion of felony in the county of *A.* and the constable

(*) This holds only as to felony touching the death of a man, but not in case of other felony, as theft, &c. *vide supra, p. 73.*

charge him in the king's name to yield himself, and he either before or after the arrest pursue him into another vill, nay into another county, the constable hath the same privilege and protection upon his pursuit and arrest, as if he were taken in the county of *A.* tho yet he must bring him before the justice of that county where he was taken: *vide Crompton de Pace, p. 172, 173. Dalt. p. 340.(h)*

But for this latter case I take the law to be all one in case of a constable having a warrant to arrest a felon, or not having one, but doing it by his own intrinsic power *virtute officii*, namely, that if he hath or hath not a warrant from a justice of peace to arrest a felon, if the felon fly into another county before arrest, he is to be brought before a justice of that county, or to the gaol of that county, where he is arrested; but if he were once arrested and escape, and upon fresh suit he is taken by the constable in another county, yet he may be brought back to the justice, or gaol of that county where he was first arrested; (*) for in that case in supposition of law he is always in custody by force and authority of the first arrest, as well where the arrest was *virtute officii*, as where done by a warrant. *Vide 2 E. 4. 6. b. 13 E. 4. 8. b.*

And thus far touching the second case.

3. The *third* case is, where a felony is not yet committed, but in danger to be committed.

If *A.* hath wounded *B.* so that he is in danger of death, and *A.* flies and takes his house, and shuts the doors, and will not open them, the constable of the vill where it is done, or upon hue and cry, may break the doors of the house to take him, if upon demand he will not yield himself to the constable. *7 E. 3. 16 b. Barre 291.*

And in that case, if the constable be kild, it is murder; if he kill *A.* if he cannot be otherwise taken, it is no felony, but excusable and justifiable by the necessity caused by the obstinacy and default of *A.*

If there be an affray in the house, where the doors are shut, whereby there is likely to be manslaughter or [95] bloodshed committed, the constable of the vill having notice thereof, and demanding entrance, if they *within* refuse to do it, but continue the affray, the constable may break open the doors to keep the peace and prevent the danger.

Nay yet farther, if there be disorderly drinking or noise in an house at an unseasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch demanding entrance, and being refused, may break open the doors to see

(h) *New Edit. p. 534.*

(*) *Vide Part I. p. 580.*

and suppress the disorder; and this is constantly used in *London* and *Middlesex*.

I come now in the *last* place to consider what the constable is to do with his prisoner that he hath thus arrested for felony, or other causes above-mentioned.[13]

In case of a sudden affray through passion or excess of drink, he may put the persons in the stocks, or in a prison, if there be one in the vill, till the heat of their passion or intemperance is over, tho he delivers them afterwards, or till he can bring them before a justice of peace.

If an offense be committed, for which the constable may arrest, he may convey them to the sheriff, or his gaoler of the county; and if it be within a franchise, he may deliver them to the gaol of the franchise, and they are bound to receive them without taking any fine for the same by the statute of 4. *E. 3. cap. 10. vide 5 H. 4. cap. 10. 23 H. 8. cap. 2.* But the safest and best way in all cases, is to bring them to a justice of peace, and by them the prisoner may be bailed or committed, as the case shall require; but till they are bailed or discharged, or the sheriff or gaoler hath received them, they are still under the charge of the constable that took them. 10 *H. 4. 7. a. Escape 3.* Till the constable can conveniently convey the parties arrested to a justice of peace, or the common gaol, as when the arrest is in or near night, he may detain the party in the stocks; or if there be no stocks in that vill, he may bring them to the stocks of the next adjacent vill.

And if the person be of quality or sick, the constable [96] may [keep him in an house(i)] for a day and a night at least, and in some cases of necessity for a longer time, till he can with safety and conveniency convey him to a

(i) These words are not in the *MS.* but they or others to the like effect are manifestly wanted to supply the sense.

[13] He must take the party arrested before a magistrate to be examined as soon as he reasonably can. When a constable detained a party three days in order that a person whose goods had been stolen might have an opportunity of collecting his witnesses and bringing them to prove the felony, it was held he was not justified in so doing. *Wright v. Court*, 4 *B. & C.* 596; 6 *D. & R.* 623, *S. C.* If the prisoner resist or attempt to escape, he may handcuff him or use other reasonable or necessary means to prevent him, otherwise not. *Id.*

When an arrest has been made without a warrant the constable may in some cases take the party's word for his appearance before a magistrate; and this is frequently done where the charge is for an assault of a trifling nature and the defendant is of good repute and there is no probability of his absconding. 1 *Burn*, 279. See *Hardy v. Murphy*, 1 *Exp.* 295; *Arrowsmith v. Lemesurier*, 2 *N. R.* 211. In general when an affray takes place in the presence of a constable he may either keep the parties in custody till the affray is over or he may carry them immediately before a magistrate. *Churchill v. Matthews*, 2 *Sels. N. P.* 911.

justice of peace, or the common gaol. 20 *E.* 4. 6. *b.* 22 *E.* 4. 35. *b.* *Dalt.* p. 340.

The charges of sending malefactors to gaol by the common law, is to be borne by the vill where they are apprehended. 3 *E.* 3. *Coron.* 328. 4 *E.* 3. *cap.* 10.

But now by the statute of 3 *Jac.* *cap.* 10. the charge is to be borne by the prisoner, if he hath wherewith, the same to be levied by warrant of the justices of peace; and if he hath not wherewith, then the charge to be borne by the parish, township, or tithing, where the offender is apprehended, by a tax or rate to be made, as by the said act is prescribed.

And what I have herein said touching the constable is applicable to a tithing-man, headborough, burtholder, for their authority is much the same.

But the constable of the hundred is a distinct officer, and introduced upon the statute of *Winton*, *vide H.* 37 *Eliz. B. R. Croke*, n. 25. *Sharrock* and *Hanmer*; yet he seems to be a conservator of the peace.

V. *Watchmen*: Watchers are of three kinds, 1. That which is appointed by the statute of *Winton*, *cap.* 4. which is that from *Ascension-day* until *Michaelmas*, watches shall be kept in all towns from sun-setting to sun-rising in boroughs, &c. by twelve, in other towns by six or four, according to the number of the inhabitants: this watch is to be set by the constable, and the neglect thereof punishable by 5 *H.* 4. *cap.* 3. Their power is to arrest such as pass by until the morning, and if no suspicion, they are then to be delivered, and if suspicion be touching them, they shall be delivered to the sheriff, [14] *viz.* to the common gaol, there to remain until they be in due manner delivered; and if they will not obey the arrest, hue and [97] cry shall be levied upon them; but this watch extends only between *Ascension day* and *Michaelmas*. [15]

2. But there is another watch that may be kept by the constable *ex officio*, which may extend to other times, because there be other things under his charge, as a conservator of the peace, as for the purpose to raise or pursue hue and cry upon robberies committed by the statute of *Winton*, *cap.* 1. to search for lodgers in suburbs of cities, that are suspicious persons, which is to be done every week, or at least once in fifteen days by the same statute, *cap.* 4. for such as ride or go armed by the statute of 2 *E.* 3. *cap.* 3. for night-walkers and persons suspi-

[14] A watchman having apprehended a party may discharge himself from liability for an escape by delivering him to a constable or he may himself take him before a magistrate. *Dalt. ch.* 104. *R. v. Bootie*, 2 *Burr.* 164.

[15] Watchmen may imprison any person who encourages prisoners in their custody to resist. *White v. Edmunds*, *Peake*, 89.

cious either by night or day by the statute of 5 E. 3. cap. 14.[16]

And altho a constable is not bound to any precise time for this kind of watch, nor punishable, if he omit it barely for the omission, if he be ready upon occasion to do his office, when required in these cases, yet it is in his power to hold such watches, as often as he pleases, and it is convenient and justifiable, and herein the watchmen are the ministers and assistants of the constable, and are under the same protection with him, and may act as he doth; and regularly he ought to be in company with them in their walk and watch.

3. There is yet a third kind of watch, which is by authority of the justices of peace, which may be held at other times than the statute of *Winton appoints*, and the watch thus appointed hath the same power as either of the former; and this seems to be within the power of any one justice of peace by the first *Assignavimus* in his commission; *vide Lamb. Justic. Lib. I. cap. 20. p. 185. Dalt. cap. 60. p. 142.(k) and cap. 109. p. 292.(l)* but the safer way and more usual is by order of the sessions of the peace or of the court of king's bench, which hath the highest ordinary authority in matters of the peace and preservation thereof.

Now a watchman hath a double protection of the law, *viz.*
1. As an assistant to the constable, when the constable is present or in the watch, for so every man, who is assisting to the constable in the execution of his office, hath the same
[98] same protection, that the law gives the constable.

2. Purely as a watchman set by order of law; and the law takes notice of his authority *sub eo nomine*, and therefore killing of a watchman in execution of his office is murder. *Co. P. C. cap. 7. p. 52. 9 Co. Rep. 66. a. Mackally's case.*

And such a watchman may apprehend night-walkers and commit them to custody till the morning, and also felons and persons suspected of felony.

And thus far of arrests *virtute officii*.

(k) *New Edit. cap. 104. p. 352.*

(l) *New Edit. cap. 109. p. 536.*

CHAPTER XII.

OF ARRESTS OF FELONS UPON HUE AND CRY RAISED.

Hue and cry is the old common law process after felons and such as have dangerously wounded any person: And this hath received great countenance and authority by several acts of parliament.[1]

By the statute of *Westm. 1. cap. 9. (a.)* it is enacted, "That all be ready and apparelled at the summons of the sheriff & a cry de pays to pursue and arrest felons as well within franchises as without; and if they do it not and be thereof attaint, le roy prendra a eux grevement, they are to be indicted and fined for the neglect."

By the statute of 4 E. 1. *De officio coronatoris* "Hue and cry shall be levied for all murders, burglaries, men-slain, or in peril to be slain, as other-where is used in England, and all shall follow the hue and steps as near as they can; and he that doth not, and is convict thereof, shall be attached to be before the justices in eyre."

By the statute of *Winton, cap. 1.* "From henceforth every country shall be so well kept, that immediately upon robberies and felonies committed fresh suit shall be made from town to town, and from country to country;" and [99] *cap. 4.* "If any will not obey the arrest of the town, where night-walkers pass, they shall levy hue and cry upon them; and such as keep the town, (*viz.* the bailiff or constable,) shall follow with hue and cry with all the town and the towns near; and so hue and cry shall be made from town to town, until they are taken and delivered to the sheriff; and for arrestments of such strangers none shall be punished."

And this is in truth but the antient law; thus it appears by *Bracton, Lib. III. cap. 1.* where he mentions a provision *per dominum regem & ejus consilium*, (which must be intended an antient act of parliament,) *quodd omnes tam milites quam alii, qui sunt quindecim annorum & amplius, jurare debent, quod utlegatos, murdratores, robbatores, & burglatores non receptabunt, nec iis consentirent, nec eorum receptatoribus*

(a) 2 Co. Instit. p. 171

[1] Though most of such acts are now repealed by 7 & 8 Geo. IV. chap. 27. this process may still be adopted. 3 Burn, 841. edit. of 1845.

*& si quos tales noverint, eos attachiari facient, & hoc vicecomiti & ballivis suis monstrabunt, & huesium vel clamorem de talibus audiverint, statim audito clamore sequentur cum familia & hominibus de terra sua.**

And it is one of the articles of inquiry in the leet in the statute *de visu franci plegii, de hues levies & nient pursues*, and among the *capitula Itineris de huesio levato & non secuto*: vide *Coke super stat. Westm. 1. cap. 9. 2 Instit. p. 172.*

And altho it is a good course to have a justice of peace to direct his warrant for raising *hue* and *cry* to prevent causeless *hues* and *cries*, yet it is neither of absolute necessity nor sometimes convenient; for the felons may escape before the justice can be found, and *hue* and *cry* was part of the law before the statute of 1 E. 3. cap. 16. which first instituted justices of peace.

And altho also it is specially incumbent upon constables to pursue *hue* and *cry*, when called upon, and they are severally punished, if they neglect it, (b) and it prevents many inconveniencies, if they be there; for it gives a greater authority to their pursuit, and enables the pursuants in his assistance to plead the general issue upon the statutes of 7 & 21 Jac. without being driven to special pleading; and therefore to prevent inconveniencies that may happen by unruliness, it is most adviseable, that the constable be called to this action.

Yet upon a robbery or other felony committed, *hue* and *cry* may be raised by the country in the absence of the constable, it is therefore called *Cry de pais*.

Neither is there any inconvenience considerable in it; for if *hue* and *cry* be raised without cause, they that raise it are punishable by fine and imprisonment. 2 Co. Instit. p. 173.

And accordingly it was agreed by the two chief justices and three other judges, upon the trial of *Packhurst, Jackson*, and others, who were all convicted of murder, and executed, for killing two of the countrymen that followed them, being highway robbers. *Lent vacation, anno Car. 2. 26.*

In this matter of *hue* and *cry* these things are considerable, viz. 1. By whom it is to be levied. 2. How it is to be levied. 3. In what manner to be pursued. 4. What may be done by them that pursue it. 5. How punished, if omitted or neglected.

I. *Hue* and *Cry* may be raised as well by an officer of justice,

(*) Vide Part I. p. 23 & 24 in notis.

(b) By 8 Geo. 2. cap. 16. "If any constable, headborough, &c. within the hundred wherein any robbery shall happen, shall refuse or neglect to make *hue* and *cry* after the felons with the utmost expedition, as soon as he shall receive notice thereof, he shall, for every such refusal or neglect, forfeit five pounds, one half to the king, and the other half to such person as shall sue for the same."

as by the precept of a justice of peace upon information of a felony.

Or it may be raised by any private person that is robbed, or knows of any felony.

II. Touching the manner of it: It is diverse according to a variety of circumstances. 1. The party that levies it ought to come to the constable of the vill, and give him notice of a felony committed, and give him such reasonable assurance thereof as the nature of the case will bear. 2. If he knows the name of him that did it, he must tell the constable the same. 3. If he knows it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances that he knows, which may conduce to his discovery. 4. If the thing be done in the night, so that he knows none of these circumstances, he must mention the number of the persons, or the way they took. 5. If none of all these can be discovered, as [101] where a robbery, or burglary, or felony is committed in the night, yet they are to acquaint the constable with the fact, and desire him to search in his town for suspected persons, and to make *hue* and *cry* after such as may be probably suspected as being persons vagrant in the same night, for many circumstances may *ex post facto* be useful for discovering a malefactor, which cannot be at first found.(e)

III. In what manner it is to be pursued. 1. The constable is to make search in his own vill, 2 *E.* 4. 8 & 9. 2. He is to raise all the neighbouring vills next about, *Crompt. de Pace*, f. 178. b. 3. It is to be pursued with horse and foot: *vide* 27 *Eliz.* cap. 13. *Dalt.* cap. 28. p. 75.(d) *per direction de Hyde*, chief justice.

IV. What may be done in pursuance of a *hue* and *cry* levied, and therein I think as followeth:

1. That in case of *hue* and *cry* once raised and levied upon supposal of a felony committed, tho in truth there was no felony committed, yet those that pursue *hue* and *cry* may arrest and proceed, as if so be a felony had been really committed.

(c) By 27 *Eliz.* cap. 13: To the levying of *hue* and *cry*, so as to charge the hundred for any robbery it is requisite, "That the party robbed do, with all convenient speed, give notice thereof to the inhabitants of some town, village, or hamlet, near the place where the robbery was committed;" And by 8 *Geo.* 2. cap. 16. it is further required, "that the party robbed do, with all convenient speed, give notice thereof to some constable, headborough, &c. of some town, &c. near the place of the robbery, or leave notice in writing of such robbery at the dwelling-house of such constable, &c. describing, as far as the nature and circumstances of the case will admit, the felon or felons, and the time and place of the robbery; and also within twenty days next after the robbery committed, cause public notice to be given thereof in the *London Gazette*, therein likewise describing the felon or felons, and the time and place of such robbery, together with the goods whereof he was robbed." See 2 *Wilson* 112, 113.

(d) *New Edit. esp.* 54. p. 169.

And therefore the justification of an imprisonment by a person upon suspicion, and by a person, especially a constable, upon *hue* and *cry* levied do extremely differ; for in the former, there must be a felony averred to be done, and it is issuable; but in the latter, *viz.* upon *hue* and *cry* it need not be averred, but the *hue* and *cry* levied upon information of a felony is sufficient, tho perchance the information were false; and therefore

[102] I do not find any averment of a felony committed in case of a justification of an imprisonment upon *hue* and *cry*. [2] 5 H. 7. 5. a. 21 H. 7. 28. a. per Rede, 2 E. 4. 8 & 9.

And the reasons hereof are these. 1. Because the constable cannot examine the truth or falshood of the suggestion of him that first levied it, for he cannot administer him an oath, and if he should forbear his pursuit of the *hue* and *cry*, till it be examined by a justice of peace, the felon might escape, and the pursuit would be lost and fruitless. 2. Because the constable is by the acts of parliament before-mentiond compellible to pursue *hue* and *cry*, and he is punishable, and so are those of the vill, if they do it not, as appears by the acts of parliament above-mentiond. 3. Because he that first raiseth *hue* and *cry*, where no felony is committed, *viz.* the person that giveth the false information, is severely punishable by fine and imprisonment, if the information be false. 21 H. 7. 28. a. 29 E. 3. 39. a; b. & Co. *Instit.* p. 173.

And therefore if he raise a *hue* and *cry* upon a person that is innocent, yet they that pursue the *hue* and *cry*, may justify the imprisonment of that innocent person, and the raiser is punishable; and by the same reason, if he give notice of a felony committed, when there was in truth none.

2. If *hue* and *cry* be raised against a person certain for felony, tho possibly he is innocent, yet the constables, and those that follow the *hue* and *cry*, may arrest and imprison him in the common gaol, or carry him to a justice of peace.

3. If the person pursued by *hue* and *cry* be in a house, and the doors are shut, and refused to be opened, upon demand of the constable, and notification of his business, he may break open the doors; and this he may do in any case where he may arrest, tho it be only a suspicion of felony, for it is for the king

[2] By these words (*de suer et arrester les felons*) it is holden that there must be a felony done or else the arresting the party though it be upon *hue* and *cry* is unlawful because it wanteth a foundation; but if a felony be done and the *hue* and *cry* is against one that is neither indicted nor of ill fame nor suspicious nor unknown, yet the arrest of him is lawful though he be not guilty; for the *hue* and *cry* itself is cause sufficient when there is a foundation of a felony committed. And he that levieth *hue* and *cry* upon another without cause shall be attached and punished for disturbance of the king's peace. 2 *Instit.* 172.

and commonwealth, and therefore a virtual *non omittas* is in the case: *vide 5 Co. Rep. 92. b. Semain's case*. And the same law is upon a dangerous wound given, and a *hue* and *cry* levied upon the offender. *7 E. 3. 16. b. Barre 291.*

And it seems in this case, that if he cannot be otherwise taken, he may be kild, and the necessity excuseth the constable: *vide Part I. cap. 9. p. 53.*

4. Upon *hue* and *cry* levied against any person, or where any *hue* and *cry* comes to a constable, whether [103] the person be certain or uncertain, the constable may search in suspected places within his vill for the apprehending of the felons. *Dalt. cap. 28. p. 75. Crompt. de Pace, f. 178. b. 2 E. 4. 8. b.*

But tho he may search suspected places or houses, yet his entry must be *per ostia aperta*, for he cannot break open doors barely to search, unless the person against whom the *hue* and *cry* is levied be there, and then it is true he may; therefore in case of such a search, the breaking open the door is at his peril, *viz.* justifiable, if he be there; not justifiable, if he be not there; but it must be always remembered, that in case of breaking open a door, there must be first a notice given to them within of his business, and a demand of entrance; and a refusal before doors can be broken.

5. If the *hue* and *cry* be not against a person certain, but by description of his stature, person, clothes, horse, &c. the *hue* and *cry* doth justify the constable, or other person following it, in apprehending the person so described, whether innocent or guilty, for that is his warrant, it is a kind of process, that the law allows (not usual in other cases,) *viz.* to arrest a person by description.

6. But if the *hue* and *cry* be upon a robbery, burglary, manslaughter, or other felony committed, but the person that did the fact is neither known nor describable by person, clothes, or the like, yet such a *hue* and *cry* is good, as hath been said, and must be pursued, tho no person certain be named or described.

And therefore in this case all that can be done is for those that pursue the *hue* and *cry*, to take such persons as they have probable cause to suspect; as for instance, such persons as are vagrants, that cannot give an account where they live, whence they are, or such suspicious persons as come late into their inn or lodgings, and give no reasonable account where they had been, and the like: *vide 2 E. 4. 8. b.*

And here the justification of the imprisonment is mixed partly upon the *hue* and *cry*, and partly upon [104] their own suspicion; and therefore, 1. In respect that it is upon *hue* and *cry* there needs no averment that the felony

was done, yet it must be averred; that an information was given, that the felony was done, if the arrest be by that constable that first received the information, and so raised the *hue and cry*; or if the arrest were made by that constable, or those vills to whom the *hue and cry* came at the second hand, it must be averred that such a *hue and cry* came to them purporting such a felony to be done; but, 2. Also inasmuch as the *hue and cry* neither names nor describes the person of the felon, but only the felony committed, and therefore the arrest of this or that particular person, and so applied, is left to the suspicion and discretion of the constable, or the people of the second or third vill, he that arrests any person upon such general *hue and cry* must aver that he suspected, and shew a reasonable cause of suspicion.

But now by the statute of 7 *Jac. cap. 5.* the constable or any that come in his assistance, even in this case of *hue and cry*, may plead the general issue, and give the whole matter of the justification in evidence for the pursuit of *hue and cry*, tho performed by others as well as the constable, is principally the act of the constable of the vill, and the others are but as his deputies or assistants within the precincts of their constableness.

V. For the last matter, how the neglect of the pursuit of *hue and cry* is to be punished, it hath been before declared upon the statutes of 3 *E. 1. cap. 9.* 4 *E. 1.* and 13 *E. 1.* of *Winton*, they are to be indicted, fined and imprisoned.

[105]

CHAPTER XIII.

ARRESTS OF FELONS VIRTUTE PRECEPTI, OR OF WARRANTS.

I COME now to consider of arrests of felons or persons suspected of felony by warrant or precept, namely not of precepts that issue upon matter of record, as upon appeals or indictments, which regularly are to be by writ, but such warrants as are preparatory to it, or for conservation of the peace.

And herein regularly all courts and persons, that have judicial power by the common law, or by act of parliament for the conservation of the peace, have power to grant warrants for arresting of felons; but such as are simply ministerial and have no jurisdiction, as constables, cannot issue warrants for that pur-

pose, but must do their office either alone, or with others called to their assistance.

The court of king's bench hath not only a power to issue writs upon indictments or appeals before them, but have also power by order to command the sheriff of the county where they they sit, or the marshal of the court, to apprehend felons or disturbers of the peace, and bring them before the court; and this is warrantable by the custom of the court, which is part of the law of the land.

Yea I have known by great advice, that where there hath been information upon oath of a breach of the peace, and a design by persons whose names could not be known, to commit a riot or breach of the peace, an order hath been made by the court to the sheriff to bring before them such persons as should be probably suspected to be parties therein, and to bring them into the court, *M. 23 Car. 2. in Storie's case*, for attempting to take away the daughter of Mrs. *Gilburn* with masks and vizards.

See before *cap. 1.* concerning the king's bench.

A commission issues out of the *chancery* under the great seal to take persons that were notoriously famed [106] of felony or trespass, tho they were not indicted, and by virtue hereof the commissioners issue a precept to *B.* to take *J. S.* that had dangerously wounded another; this was admitted a good justification in the officer, tho the commission itself was against law, *24 E. 3. 9. B. Faux Imprisonment 9. Vide simile 42 Assiz. 5.* where a commission issuing out of *chancery* to take *J. S.* and his goods, before he was indicted, is ruled to be against law.

And therefore I would never advise these general proclamations, that have sometimes issued, to take certain persons notoriously suspected of felony but not indicted.

It is true, that such a proclamation may be a means to give notice of felons, but so it may perchance include true men; and therefore what by law a constable, sheriff, officer, or private persons may do in arresting of felons or suspected persons without such a proclamation may be justifiable, but not by virtue of the proclamation, neither can any justification be made by virtue of it; and therefore such proclamations against persons not indicted are against law, and may bring great inconveniencies, 1. By leading the country into an error. 2. By the example itself, which may be of ill consequence to honest men, as well as of use to apprehend felons.

27 Assiz. 35. A man was indicted of felony before justices of *oyer and terminer*: It is admitted, that the justices may not only award process of outlawry thereupon, but may

also issue a commission (which is no other than a warrant under their hands and seals) to take the party, and that by virtue of such a warrant or commission they may break open doors, but they must shew their commission, if demanded.

By the common law the sheriff of the county might give out a warrant for the apprehending a felon before indictment; and this is farther confirmed by the statute of 3 E. 1. cap. 9. *au commandment, & a les summons de viscount & au cry de pays* must be understood disjunctively, (or at the cry of the country) for the sheriff had jurisdiction at the common law to take indictments of old felonies in his *Turn*; and [107] so he hath still, tho he is not now to make process upon them by the statute of 1 E. 4. cap. 2.

The coroners have also power to attach manslaughterers by their warrants after inquisition, whereby they are found guilty, but that seems not to be all their power; but they may make out warrants for apprehending those persons that are not, or cannot be presented before them, as those that were present and not guilty; nay also of burglars and robbers, and yet they cannot take an inquisition touching them; this appears evidently by the statutes of 3 E. 1. cap. 9. and 4 E. 1. *Officium coronatoris*. And with this agrees the common usage at this day for the coroners to take manslaughterers before their inquisition be taken, for many times the inquest is long in their inquiry, and the offender may escape, if he stay till the inquisition delivered up.

But because at this day the greatest part of the business of this nature is dispatched by justices of the peace, I shall be more large touching their warrants, wherein nevertheless much of what is said therein will be applicable to the warrants that issue in like cases by other persons.

And therein I shall principally consider these particulars.

1. When and in what cases they may issue their warrants for the apprehending of felons. 2. To whom. 3. How and in what manner such precept or warrant is to issue. 4. What may be done by the officer in pursuance thereof.

I. As touching the first, in what cases justices of peace may make warrants for the taking of felons or persons suspect of felony.[1]

[1] Magistrates seldom grant a warrant in the first instance in cases of *misdeemeanor*, unless in aggravated cases or where there is a likelihood of the party absconding; if he be apprized of the complaint being made against him: in ordinary cases it is most usual to issue a *summons* in the first instance and if that be disobeyed then to issue a warrant. See 2 *Barnard*, 34, 77, 101. But if the summons has been duly served and the magistrate is satisfied that it was so, then he may proceed to hear and determine the case, whether the accused appear before him or not; and it is not usual then to issue a warrant. *R. v. Simpson*, 1 *Bla.* 44; 6 *Burn*, 353, edit. 1845.

My lord *Coke* in his jurisdiction of courts, *cap.* 31. *p.* 176, 177. hath deliverd certain tenets, which, if they should hold to be law, would much abridge the power of justices of peace, and condemn the constant and usual practice, and give a loose to felons to escape unpunished in most cases, (*) *viz.* 1. That a justice of peace cannot upon complaint issue a warrant to apprehend a felon before indictment, grounding himself upon the hasty opinion of *Fitzherbert* and *Brudnell*, 14 *Ed.* 3. 16. a. who yet hold the officer excused, that makes the arrest upon that warrant. 2. That admit he may arrest, he [108] cannot break open a house to take the felon by virtue of that warrant. 3. That admit he may arrest by that warrant, yet he cannot issue a warrant in case only of suspicion. 4. That admit he may, yet no house can be broken by virtue of such warrant.

Touching the *second* and *fourth* matter I shall consider them, when I come to the business of the officer's power in pursuance of a justice's warrant; but touching the power of issuing this warrant by the justices of peace, I shall now consider it: And therein I say as followeth.

1. That a justice of peace hath power to issue a warrant to apprehend a person accused of felony, tho not yet indicted.

That, upon which the doubt must arise to those that made a doubt of it, must certainly be the statutes of *Magna Charta*, *cap.* 29. *Nullus liber homo imprisonetur &c. nisi per legale iudicium parium suorum vel per legem terræ.* 25 *E.* 3. *cap.* 4. "None shall be taken upon suggestion made to the king or his council, unless it be by presentment or indictment, &c. or by writ original at the common law." 28 *E.* 3. *cap.* 3. "No man shall be taken, or imprisoned, or disinherited, or put to death without being brought to answer by due process of law." 42 *E.* 3. *cap.* 3. "Whereas upon false accusations people have been brought before the king and council, it is enacted, that no man shall be put to answer without presentment before justices or matter of record, or by due process and writ original according to the old law of the land.

Now all the weight of the question upon these statutes is to see what the law of the land is; for if these preparatory arrests of felons be not against the law of the land, they are not restrained by these statutes. Certainly by the law of the land, if a felony were committed, or but suspected to be committed, a man might be arrested by the party that knows, or upon probable grounds suspects him to be the felon; or by a constable upon complaint, or upon *hue and cry*, and he might be carried

(*) *Vide Part I. p. 579 & supra p. 79.*

to prison, and there detained till delivered by due course of law; and yet this person so arrested not all this while indicted: *vide statutes* 3 *E.* 1. *cap.* 9. 4 *E.* 3. *cap.* 10. and 5 *E.* 3. *cap.* 14. And all this was in order to preserve the peace of the kingdom, and to suppress felons.

But this being not found effectual enough, by the statute of 1 *E.* 3. *cap.* 16. for the better keeping and maintaining of the peace commissions are to issue for the same in the several counties; this was their primitive institution. Their power was enlarged by the statute of 18 *E.* 3. *cap.* 2. to hear and determine felonies and trespasses: and by the statute of 34 *E.* 3. *cap.* 1. their power is farther enlarged, and particularly their taking as well persons suspected as indicted of felonies mentioned in that act is required, which, tho perchance it refer only to those that have been robbers and gone beyond the sea and since returned, yet it is a pattern for others.

Now by these statutes surely as much power is intended to be translated to the justices of peace in order to the preservation thereof, as was in a constable or private person, for the justices of the peace are conservators of the peace and more.

And let a man look upon all the acts of parliament, that have been down to this day, he shall find that the power of justices of peace to convene and commit felons before indictment is allowed. 4 *E.* 3. *cap.* 2. Sheriffs shall not let to mainprise such as be indicted or taken by justices of peace, unless mainpernable by law, 1 *R.* 3. *cap.* 3. and 3 *H.* 7. *cap.* 3. concerning bailing of prisoners committed upon suspicion, 1 & 2 *P.* & *M.* *cap.* 13. 2 & 3 *P.* & *M.* *cap.* 10. by which it appears, that justices of peace may commit for felony, yea or for suspicion of felony, 3 *Jac.* *cap.* 10. 5 *H.* 4. *cap.* 10. so that the imprisonment before indictment is surely lawful and not within the restraint of *Magna Charta*; and if so, then surely their arrest is much more lawful, for it is but to bring persons to an examination in order to their commitment, bail, or discharge; and there is no greater record of their commitment than of their arrests.

2. He may also issue a warrant to apprehend a person suspected of felony, tho the original suspicion be not in [110] himself, but in the party that prays his warrant; and the reason is, because he is a competent judge of the probabilities offered to him of such suspicion.

And as a constable may upon complaint arrest a person suspected of felony, as appears by what hath been said in the foregoing chapters, (*) so a justice of peace may do the like by his warrant; and it is also the constant practice accordingly.

(*) *Vide cap.* 10. p. 89. and *cap.* 11. p. 91. See also *Part I.* p. 610.

But that I may say it once for all, it is fit in all cases of warrants for arresting for felony, much more for suspicion of felony, to examine upon oath the party requiring a warrant, as well whether a felony were done, as also the causes of his suspicion, for he is in this case a competent judge of those circumstances that may induce the granting of a warrant to arrest.

And if there were no other reason to prove it than this, it were sufficient; namely, that the justice of peace may commit him to gaol that is brought before him for such suspicion, or bail him, as appears by the statutes of 1 R. S. cap. 3. 3 H. 7. cap. 3. 1 & 2 P. & M. cap. 10. and therefore *a fortiori* may make a warrant to convene or bring him before him to examine the cause of the suspicion.[2]

II. As touching the second matter, to whom this warrant is to be directed?

Usually the warrant or precept is directed to the sheriff,[3] or bailiff, or constable, or tithingman, and they are bound to execute it:[4] and if they do not, they may be indicted and fined for their neglect.

But it may be directed to any private person[5] or his own servant, 14 H. 8. 16. *a. Crompt. de Pace*, f. 147. b. but he is

[2] It seems probable that the practice of justices of peace in relation to this matter also is now become law, and that any justice of the peace may justify the granting of a warrant for the arrest of any person upon strong grounds of suspicion for a felony or other misdemeanor before any indictment hath been found against him. Yet inasmuch as justices of peace claim this power rather by connivance than any express warrant of law, and since the undue execution of it may prove so highly prejudicial to the reputation as well as the liberty of the party, a justice of peace cannot well be too tender in his proceedings of this kind, and seems to be punishable not only at the suit of the king, but also of the party grieved if he grant any such warrant groundlessly and maliciously, without such a probable cause, as might induce a candid and impartial man to suspect the party to be guilty. And since both Coke and Hale seem to disapprove of such warrants granted upon suspicion, and the old books seem generally to disallow all arrests for the suspicion of felony made by any other person whatsoever, except the very person who hath the suspicion, it is certainly a safe way of proceeding for him who hath the suspicion to make the arrest in his proper person, and to get a warrant from the justice of peace to the constable to keep the peace. 2 *Hastings*, 84.

[3] If a warrant be directed to the sheriff he may command his bailiff, under-sheriff or other sworn and known officer to serve it, without writing any precept. But if he will command another man that is no such officer to serve it, he must give him a written precept, otherwise an action of false imprisonment will lie. *Lamb. 89; Dek. 443.*

[4] If a warrant appear on its face to be illegal, a constable is not bound to execute it. *Conner v. Commth. 3 Binney, 35.*

[5] *R. v. Kendal*, 1 *Ld. Rayn. 66; Commth. v. The Keeper*, 1 *Ashmead*, (Penns.) 183; *Alister in Massachusetts* by statute, unless in case of necessity. *Commth. v. Foster*, 1 *Mass. 488.*

not bound to execute it; but if he execute it, it is as good as if he were an officer.

If a warrant be directed from a justice of peace to a constable of *D.* to arrest a felon, &c. he is not bound to go out of the vill, where he is constable, to execute the warrant; but yet if he do execute it in another vill, it is good enough, for he acts herein not simply as constable of *D.* but by virtue of the justice's warrant; [6] and so it was ruled in my time at the assizes in *Norfolk* about 1668.

III. As to the third matter, how and in what manner it is to be made or issued? Touching which these things are regularly to be observed.

The party that demands it ought to be examined upon his oath touching the whole matter, [7] whereupon the warrant is demanded, and that examination put into writing.

The party charging another thus with felony ought to be bound by recognizance to prosecute at the next sessions or assizes, as the case shall require. [8] *Dalt. cap. 117. p. 334.*

The warrant ought to be under the hand and seal of the justice, [9] & *Co. Instit. p. 52.* It must have a certain date, but the place, tho it must be alleged in pleading, need not be expressed in the warrant. [10] 14 *H. 8. 16. a.*

[6] ——— v. *Norman*, 1 *Ld. Raym.* 736; *Clark v. Worley*, 7 *Sergt. & Rawle*, 352.

A warrant directed to constables generally cannot be executed by a constable out of his own precinct. *R. v. Chandler*, 1 *Ld. Raym.* 546; *Clark v. Worley*, *ut sup.*

Or to some especially and all generally. *Blatcher v. Kemp*, 1 *H. Bl.* p. 154; *R. v. Wier*, 2 *D. & R.* 444; 1 *B. & C.* 286. To ———, constable, it is well, if executed by the constable of the district. *Paul v. Vankirk*, 6 *Binney*, 124.

Now by 5 *Geo. IV. ch. 18. § 6*, constables may execute warrants out of their precincts, provided the place in which such warrants are executed be within the jurisdiction of the justice granting or backing the same.

[7] 2 *Barnard*, 37, 77, 101; *Caudle v. Seymour*, 1 *Gale & D.* 454; 1 *A. & El.* 869, *S. C.*; *Butt v. Conant*, 1 *B. & E.* 548; *State v. J. H.* 1 *Tyler*, 444; *Conner v. Commonwealth*, 3 *Binney*, 38.

[8] See ante chap. 7. p. 52.

[9] *State v. Curtis*, 1 *Hayw.* 471; *Silver v. Ward*, *N. Ca. Law Reps.* 548; see *Willis' Reps.* 411; *Bull. N. P. C.* 83; 1 *Chit. Cr. L.* 38.

So inferred in pleading. 2 *Saund.* 305, n. 13.

No seal required in New York by statute 2 *R. S.* 706, § 3.

He need not style himself "justice" in the warrant. 6 *Mod.* 75.

[10] It is safe but perhaps not necessary in the body of the warrant to show the place where it was made, yet it seems necessary to set forth the county, in the margin at least if it be not set forth in the body. 2 *Hawk. c.* 13, § 23; *Lamb.* 90; *Dalt. ch.* 169.

The warrant of a judge extends all over England, and is tested England; that of a magistrate is tested of the particular county or precinct over which his jurisdiction extends. 4 *Blacks. Comm.* 291; *Fortescue*, 143.

Regularly the warrant ought to contain the cause specially, and should not be generally *to answer such matters as shall be objected against him*, because it cannot appear, whether it be within the jurisdiction of the justice of peace, neither can it appear whether the party be bailable or not. 2 *Co. Instit.* p. 52. 591.

And therefore upon such a general warrant returned upon an *habeas corpus*, it is in the pleasure of the court of king's bench to bail or discharge him; and accordingly for this reason, *P. 23 Car. B. R.* in *Brown's* case, he was discharged.

But yet I hold such a warrant is not therefore void, but if *de facto* the matter be within the jurisdiction of the justice, and so averred, such a general warrant is a good justification especially in case of felony, and antiently it was generally held such general warrants were good in cases of treason or felony, (*) tho in warrants of the peace and good behaviour the cause must be shewn, that the party may come provided with his sureties; and accordingly *vide Rastal's Entries*, tit. *Attachment* 1. *Dalt. cap.* 117, p. 329. (b) *Crompt. de Pace*, f. 148. a. *T. 37. Eliz. C. B. Broughton* and *Mulshoe*; (c) and accordingly ruled by my lord *Coke* himself contrary to his opinion in his [112] comment upon *Magna Charta*, *T. 7 Jac. C. B.* the case of the mayor of *Canterbury*: *vide supra*, *Part I. cap.* 54. p. 609. *Breach of prison*. [11]

(*) *Crompt.* 233. b. 1 *Std.* 78. *Dalt.* p. 574. and *Sir William Wyndham's* case, *Trin. 2 Geo. I. B. R. Vide tamen* the case of *Kendal* and *Rowe*, *State Tr.* Vol. IV. p. 861, 862. 5 *Mod. Rep.* p. 80, 82. 85.

(b) *New Edit.* p. 574.

(c) *Moore*, p. 408.

[11] As to the warrant setting forth the cause of arrest *Dalton* says, "If it be for the peace or good behaviour or the like when sureties are to be found or required, then the warrant ought to contain the special cause and matter whereupon it is granted, to the intent that the party upon whom it is served may provide his sureties ready and take them with him to the justice of peace to be bound for him; but if the warrant be for treason, murder or felony or other capital offence or for great conspiracies, rebellious assemblies or the like, it needs not contain any special cause, but there the warrant of the justice of peace may be to bring the party before him to make answer to such things or matters generally as shall be objected against him on the king's majesty's behalf: and this is now the common usage by the report of Mr. *Crompton*." *Dalton*, chap. 169, and cases by him cited; and 2 *Hawk. chap.* 13. *sect.* 25.

But *Lambard* says, "Every warrant made by a justice of the peace ought to comprehend the special matter upon which it proceedeth; even as all the king's writs do bear their proper cause in their mouth with them: and as for the form that is commonly used, *to answer such things as shall be objected*, and such like, they were not fetched out of the old learned precedents, but lately brought in by such as either knew not or cared not what they writ." In the case of *Candle v. Seymour*, 1 *Gale & D.* 889; *S. C.* 1 *Ad. & El. (N. S.)* 889. a warrant in the

A justice of peace may make his warrant to apprehend a person suspected by name upon a complaint made to him; but where upon a complaint to a justice of a robbery he made a warrant to apprehend all persons suspected, and bring them before him, this was ruled a void warrant, *P. 24 Car. 1.* in the case of justice *Swallowe*, and was not a sufficient justification in false imprisonment. [12]

A justice of peace may make a warrant as well in case of felony as of the peace to bring the party *before himself*, and then the officer ought to bring the party before him, that made the warrant, *5 Co. Rep. 59. b. Foster's case*; or he may make the warrant to bring him *before any of his majesty's justices of the peace*, or *before himself*, or *any of his majesty's justices of the peace*, and then it is in the election of the officer to bring him before which justice of the county he pleases; and it is not in the election of the party to go before whom he pleases; adjudged *5 Co. Rep. 59. b. Foster's case* against the opinion of *Fineux 21 H. 7. 21. a.*

And in some cases he may make his warrant to bring him to the sessions of the peace, tho it is better to bring him before himself or some justice, that the party may be in the mean time bailed; if there be cause, to appear at the sessions of the peace or gaol-delivery, as the cause shall require.

A warrant of the peace may be to bring the party complained of to the justice, to the intent to find sureties for his appearance at the sessions, &c. and in the mean time to keep the peace, or the warrant may be *si recusaverit*, then to bring him to the common gaol *ibidem moraturus, quousque gratis hoc fecerit*; and yet the constable or officer may bring him in that case before the justice; and if he refuse there to give sureties, he may by virtue of the first warrant bring him to gaol, and commit

above general form "to answer such things as shall be objected against you on the oath of M. W." was held bad.

In *New York* it is provided by statute 2 R. S. 706. §. 3, that the warrant shall recite the accusation made by the complaint. See *Barbour's Crim. Treat.* 457; see *Conner v. The Commonwealth*, 3 Binn. 38.

[12] See *Lambard*, 87; *Candle v. Seymour*, 1 Gale & D. 889; *Money v. Leach*, 3 Burr. 1766; *ex parte Nisbet*, 8 Jur. 107.

For it is the duty of the magistrate and ought not to be left to the officer to judge of the ground of suspicion; and a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant, for the point upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not. It is therefore in fact no warrant at all; for it will not justify the officer who acts under it: whereas a warrant properly penned, (even though the magistrate who issues it should exceed his jurisdiction) will by *stat. 24. Geo. II. chap. 44*, at all events indemnify the officer who executes the same ministerially. 4 *Blacks.* 291.

without any farther warrant or *mittimus*, 5 *Co. Rep.* 59. b. *Foster's case*.

The warrant of a justice before indictment may be in the king's name with the *Teste* of the justice, or it [113] may be in the name of the justice of peace himself; [13] the latter most usual; but process after indictment issued from a sessions of the peace is always in the king's name. *Dalt. Justice*, p. 404. 347, 348. But whether generally a justice of peace out of sessions can issue a warrant to apprehend persons offending against a penal law, tho' within their cognizance, and so to bind them over to the sessions, or in default thereof to commit them, and this before indictment, seems doubtful: [14] *vide Lamb.* 183, 189. *Dalt. cap.* 117. p. 331. These things seem to make against it. 1. Because some acts of parliament do particularly and expressly authorize them to it, which they would not have done, if it had been otherwise lawful. 2. Because in most cases of this nature, tho' the party were indicted, or an information preferred, yet the *capias* was not the first process but a *venire facias* and *distringas*, and in cases of information no process of outlawry at all, 8 *H. 6.* 9. b. until the statute of 21 *Jac. cap.* 4. gave process of outlawry in actions popular, as in actions of trespass *vi & armis*.

In case of a complaint and oath of goods stolen; and that he suspects the goods are in such a house, and shews the cause of his suspicion, the justice of peace may grant a warrant to search in those suspected places mentioned in his warrant, and to attach the goods and the party in whose custody they are found, and bring them before him or some justice of peace to give an account how he came by them, and farther to abide such order as to law shall appertain: *vide Dalt. p.* 853. [15]

And this is warrantable by law, and without it felons could not in many cases be discovered, and is the constant practice at this day, notwithstanding the opinion of my lord *Coke* in his jurisdiction of courts, p. 176.

But in that case it is convenient, 1. To express that the searches be made in the day-time. 2. That the party suspect-

[13] *Dickinson v. Rogers*, 19 *Johnson*, 279.

[14] It seems that antiently no one justice of peace could legally make out a warrant for an offence against a penal statute, or other misdemeanor, cognisable only by a sessions of two or more justices; for that one single justice of peace hath no jurisdiction of such offence, and regularly only those who have jurisdiction over a cause can award process concerning it. Yet the long, constant, universal and uncontrolled practice of justices of peace seems to have altered the law in this particular, and to have given them an authority in relation to such arrests not now to be disputed. 2 *Hawk.* 84.

[15] *Vide post, chap.* 18.

ing be present to give the officer information of his goods. 3. There can be no breaking open of doors to make the search, but he must enter *per astia aperta*, or upon the voluntary opening of the door by the house-keeper or his servants; and the reason is, because the bare having of stolen goods in his house doth not necessarily make a man either a felon or accessory. 4. But because the having of stolen goods in his custody is *prima facie* an evidence of a felony and a good cause of suspicion, it is a lawful clause in the warrant to attach the party, in whose custody they are found, to come before the justice. 5. The goods being found ought not to be delivered to the party complaining, but to remain in the constable's hand, till either by a writ of restitution upon the conviction of the felony, or by due order of the court they be delivered.

But the general warrant to search all places, whereof the party and officer have suspicion, tho it be usual, yet it is not so safe upon the reason of justice *Swallow's* case before cited; and yet see precedents of such general warrants, *Dalt. p. 358, 354.*

The warrant of a justice of peace ought regularly to mention the name of the party to be attached, and must not be left in generals or with blanks to be filled up by the party afterwards. [16] *Dalt. cap. 117. p. 329.* If there be a riot or breach of the peace in the presence of one or more justices, they may arrest the rioters themselves, or command any officers or others by word of mouth without warrant to arrest them, and they

[16] See 1 *Russell on Crimes*, 620.

A warrant to apprehend _____ Hood (omitting the Christian name) of B. in the parish of F. by whatsoever name he may be called or known, the son of Samuel Hood to answer, &c." was held defective as omitting the Christian name, assigning no reason for the omission nor giving any distinguishing particulars of the individual; and the conviction of the prisoner because he had resisted was held wrong. *R. v. Hood*, 1 *R. & M. C. C. R.* 181. *Wells v. Jackson*, 3 *Munf.* 458. But if name unknown, *ante*, Vol. 1. 577.

It is of the essence of a warrant that it should be so framed, that the officer should know whom he is to take and that the party upon whom it is executed should know whether he is bound to submit to the arrest. 1 *Russell*, 519. A warrant containing a wrong name is no justification, although the person arrested is the person for whom the warrant was meant. *Hoye v. Bush*, 1 *M. & Gr.* 775. The object of the warrant in criminal as in civil process is to identify the party intended to be arrested. See 3 *Wendell*, 350; 9 *ib.* 319; 3 *Munf.* 458.

The fourth article of the amendments to the *Constitution of the United States* provides "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

There is provision to the same effect in the Bills of Rights of most of the State Constitutions.

may by virtue thereof *flagrante crimine* arrest them in the absence of the justice by the true meaning of the statute of 34 E. 3. cap. 1. and 13 H. 4. cap. 7. *quod vide* adjudged 14 H. 7. 9 & 10.

And therefore if a riot be committed and dispersed by the coming of the justice of peace, and they be suspected probably to meet again or threaten to do so, tho the constables may *ex officio* suppress the riot, and raise the power of the vill to do it; yet I think it clear, that a justice of peace may deliver a special warrant in the hands of any person to arrest the rioters, if they re-assemble, tho there be no particular persons named in the warrant, because it may be impossible [115.] to be known what their names are, and yet the peace is necessary to be kept, as well as the breach of it to be punished; and the justice cannot always personally watch their re-assembling, but must trust others to do it; and this is admitted of all hands in the book of 14 H. 7. 9. and the only doubt is, whether it may be done by word, which yet is adjudged there good.

And thus far for warrants.

IV. The fourth thing is the manner and order of their execution.[17]

If a warrant or precept to arrest a felon come to an officer or other, if the felon be arrested and after arrest escape into another county, yet he may be pursued and taken upon fresh pursuit, and brought before the justice of the county where the warrant issued, for the law adjudgeth him always in the officer's custody by virtue of the first arrest; but if he escapes before arrest into another county, if it be a warrant barely for a misdemeanor, it seems the officer cannot pursue him into another county, because out of the jurisdiction of the justice that granted the warrant; but in case of felony, affray, or dangerous wounding; the officer may pursue him, and raise *hue and cry* upon him into any county, but if he takes him in a foreign county, he is to bring him to the goal or justice of

[17] The directions of the warrant must be strictly observed. *Price v. Messenger*, 2 B. & P. 162. *Bell v. Oakley*, 2 M. & S. 261.

A warrant directed to several may be executed by any one of them; 1 *East P. C.* 520. but if directed to two or more jointly only, it seems all must execute it. *Boyd v. Durand*, 2 *Tunst.* 161; *Co. Litt.* 1816; *Dalton*, ch. 169.

The warrant is not returnable at any particular time, but continues in force until it is fully executed and obeyed though it were seven years, provided the magistrate so long lives. *Per Ld. Kenyon, Dickinson v. Brown, Peake's N. P.* 344. 1 *Esp.* 219, & C. See *R. v. Williams, R. & M. C. C. R.* 387. It may be executed at any time while it is in force. 1 *East P. C.* 324; *Lawrence v. Hedges*, 3 *Tunst.* 14. A person may be twice apprehended under the same warrant, if its purposes have not been effected. *Peake's Rep.* 344; *contra, Dall.* 444.

that county, where he is taken, for he doth not take him purely by the warrant of the justice, but by the authority that the law gives him; and the justice's warrant is a sufficient cause of suspicion and pursuit. 2 *E. 4. 6. b. Dalt. cap. 118. p. 340. 7 E. 3. 16. b. 11 E. 4. 4. b.*

Tho a person, that hath a warrant to arrest for felony or other misdemeanor, may call others to his assistance, yet he cannot make a warrant to another as his deputy to execute it, or command another to execute it in his absence. [18] 8 *E. 4. 14. a.*

But it is held, that if the warrant be directed to the sheriff, he may make a warrant to his bailiff to execute it, and may command by word his under-sheriff to execute it without any other warrant. 8 *E. 4. 14. a. Dalt. cap. 117. p. 332.*

If a warrant issue from a justice of peace to a private person to arrest for felony or any other matter, he is not bound to shew his warrant, unless it be demanded, and then he must shew it. [19]

But if it be directed to a known officer, as to the sheriff, who is a known officer in the county, or to a constable, who is a known officer in the vill, he is not bound to shew his warrant; tho demanded, no more than a bailiff *jurus & conus*; it is enough for him to say *I arrest you for felony, &c. in the king's name.* 8 *E. 4. 14. a. 14 H. 7. 9. b. 21 H. 7. 23. a. 9 Co. Rep. 69. Mackally's case. (*)*

(*) This was an arrest in a civil action, and the warrant there meant was not the writ or warrant for arresting the party, but the general warrant constituting him bailiff, and of this are the cases in the year-books here cited to be understood; tho it may be otherwise in case of felony, because in such case a private person may arrest a felon without any warrant at all. *Vide Part I. p. 458. in notis.*

[18] It is not necessary that the bailiff should be actually in sight, but he must be so near as to be near at hand and acting in the arrest. *Per Aston, J. Batch v. Archer, Cowp. 63.*

A warrant must be executed by the party named in it or by some one assisting such party and in his presence either actual or constructive. 1 *Russell, 615.*

A constable having a warrant to apprehend the prisoner, gave it to his son, who went in pursuit of the prisoner in company with his brother, the father stayed behind; the brothers found the prisoner lying under a hedge, and when they came up, he had a knife in his hand, running it into the ground; he got up from the ground to run away, one of them laid hold of him, and he stabbed him with the knife; the father was in sight, about a quarter of a mile off. *Parks, B. held, the arrest was illegal, as the father was too far off to be assisting in it. R. v. Patience, 7 C. & P. 775. See R. v. Whalley, 7 C. & P. 245.*

[19] A person sworn and commonly known and acting within his own precinct need not show his warrant, but he ought to acquaint the party with the substance of it. 2 *Hawk. c. 13. § 28; Arnold v. Steeves, 10 Wendell, 574; State v. Curtis, 1 Hayw. 471. See Commth. v. Field, 13 Mass. 321.*

An officer gives sufficient notice what he is, when he says to the party "I arrest you in the king's name," &c. And in such case, the party at his peril ought

But it is reasonable and also safe for the officer to acquaint him what he attacheth or arresteth him for, for it is a great security to the officer that arrests him, and just for the party arrested to know the cause for what it is.

A warrant of a justice of peace to arrest for felony may be executed in a franchise within the county, for it is the king's suit, in which a *non omittas* is virtually included.

Where by virtue of a warrant from a justice of peace the house may be broken to apprehend a felon or other malefactor, there are these diversities.

Upon a warrant to search for stolen goods the doors cannot be broken open; for tho' it be for the king, yet the law enables not the breaking of houses in all cases for the king: (*vide statute 12 Car. 2. cap. 19.* a special act to enable the search and breaking open of an house in case of goods uncustomed) and therefore the entry to search by such a warrant must be *per ostia aperta*.

So upon an *excommunicato capiendo*, tho' it be the king's suit, yet doors cannot be broken to take him. *H. 42 Eliz. C. B. Croke, n. 17. Smith and Smith. (k)*

If a justice of peace issues a warrant to apprehend a felon, who is in his own house, and after notice of the warrant and request to open the door it is refused or [117] neglected to be done, the officer may break open the door to take him, [20] and the same law is, if it be but for suspicion of felony. *13 E. 4. 9. a. 5 Co. Rep. 91. b. Semain's case. (†)*

And so much more may he break open the house of another person to take him, for so the sheriff may do upon a civil process. *5 Co. Rep. 93. v. Semain's case.* But then he must at his peril see that the felon be there, for if the felon be not there, he is a trespasser to the stranger whose house it is; but in both cases the officer must first notify his business that he comes about, and demand admission. *Ibidem.*

But in case of warrants to search for stolen goods I think the doors of any person cannot be broken up.

(k) *Cra. Eliz. 741.*

(†) *Part I. p. 582.*

to obey him, though he knows him not to be an officer, and if he has no lawful warrant the party grieved may have his action of false imprisonment. *Dalt. 444. See Hall v. Roche, 8 T. R. 188; Hodges v. Marks, Cro. Jac. 485; Foster, 310; 1 Russell, 624; 1 East, P. C. 315.*

[20] But only upon strong necessity and after notice. *Curtis' case, Foster, 135; 2 Hawk. ch. 14. § 1; Lannock v. Brown, 2 B. & Ald. 592. See Burdett v. Abbott, 14 East, 163; State v. Smith, 1 N. Hamp. 346; Bell v. Clap, 10 Johnson, 263; State v. Shaw, 1 Root, 134; Kelcey v. Wright, 1 Root, 83.*

If a warrant of the peace issue from a justice of peace, the officer or minister of such warrant may break open a door in case of refusal to open after demand and notice of his business: ruled by *Popham* and *Clerk* 3 *Jac. Dalt. cap.* 78. p. 204, 265.

Now touching the killing of a man *justiciari se nolentis*; where there is a lawful warrant against him, much hath been said before; where I considered the constable's power; (*) somewhat I shall say here.

It is necessary in this case to consider the difference between an arrest upon a warrant for felony, and an arrest for a simple misdemeanor.

And also a difference if the officer kills him in case of a flight, or of a resistance and an attempt of a rescue after arrest.

If there be a warrant against *A.* for a trespass or breach of the peace, and *A.* flies and will not yield to the arrest, or being taken makes his escape, the minister kills him, this is murder.

But if *A.* either upon the attempt to arrest, or after the arrest assault the minister, that hath the warrant to arrest him, to the intent to make his escape from him, and the minister standing upon his guard kills him, this is no felony, for being

[118] by law authorized to arrest him, he is not bound to go back to the wall, as in common cases of *se defendendo*, for the law is his protection. And therefore as on the one side if *A.* kills him, it is murder, so on the other side if upon this assault by *A.* the minister kills him, it is no felony; the necessity excuseth him, if he cannot otherwise save himself and perform his duty.

And herein it agrees with the common case of a sheriff's bailiff in the execution of his warrant. *Co. P. C. cap.* 8. p. 56.

But where a warrant issueth against a felon, and either before arrest or after he flies and defends himself with stones, as the book of 3 *E. 3. Coron.* 290. or with his bow and arrows, as the record is of *M. 22 E. 3. Rot.* 117. *coram rege Ebor.* (m) so that the officer must give over his pursuit, or otherwise cannot take him without killing him, if he kills him,

(*) *Supra*, p. 91 & 77. Part I. p. 489.

(m) This was the case of *Henry Vescy*, who had been indicted before the sheriff in *Turno suo anno R. R. nono* of divers felonies, whereupon the sheriff *mandavit commissionem suam Henrico de Clyderawe & aliis ad capiendum prædictum H. Vescy & salve ducendum usque castrum de Ebor.* Vescy would not submit to an arrest, but fled, & *inter fugiendum* shot with his bow and arrows at his pursuers, but in the end was kild by *Clyderawe*. *Clyderawe* was afterwards indicted, "quod felonice interfecit prædictum *H. Vescy*, sed quia compertum est, quod prædictus *H. de Clyderawe* prædictum *H. Vescy* indictatum de diversis felonis fugam faciendo, ut felonem domini regis, virtute commissionis sue prædictæ anno R. nono interfecit et non felonice; consideratum est, quod idem *H. de Clyderawe* eat inde quietus."

it is no felony; and the same law is for a constable, that doth it *virtute officii*, or upon a pursuit of *hue and cry*.

And the same law it is, if in truth he were no felon, but yet a warrant is against him as suspect of felony, and he having notice thereof flies and resists, for the officer or minister ought to pursue his warrant, or otherwise he is punishable; and the party by his flight and resistance is accessory to his own death.

But then there must be these cautions. 1. He must be a lawful officer, or there must be a *hue and cry*, or there must be a lawful warrant. 2. That the party ought to have notice of the reason of the pursuit, namely because a warrant is against him, for his flight must be upon notice to him of the intent to arrest him for felony. 2 *E. 4. 9. a.* And 3.

It must be a case of necessity, and that not such a [119] necessity as in the former case, where an immediate assault is made upon the minister just at his coming to arrest, or to rescue himself from him; but this is the necessity, *viz.* that he cannot otherwise be taken, and the reason is, because it is for the public good, and they are punishable, if they neglect in any manner what they ought to do, namely the minister by fine and imprisonment, and the township by an amercement.

But tho a private person may arrest a felon, and if he flies so as he cannot be taken without he be kild, it is excusable in this case for the necessity, 22 *Assiz. 55. per Thorp*, yet it is at his peril, that the party be a felon, for if he be innocent of the felony, the killing, at least before the arrest, seems at least manslaughter for the reason above given, for an innocent person is not bound to take notice of a private person's suspicion. (*)

If a justice of peace have jurisdiction in the case, (as he hath in all felonies and breaches of the peace; yea tho it be high-treason, so far forth as it is a breach of the peace) tho he errs in granting of his warrant, it seems that the officer that executes it is excusable. 14 *H. 8. 16. a. per curiam.*

Yet in some cases, as touching rates for the poor, tho he hath jurisdiction in the matter by the statute of 43 *Eliz. cap. 2.* the officer is punishable for executing the warrant, where none ought to issue, because it is a circumscribed particular jurisdiction given him by act of parliament, which he ought strictly to pursue. *T. 10 Car. B. R. 2 Rol. Abr. 560. Nichols and Walker.*

When the officer or minister hath made his arrest, he is

(*) *Vide supra*, p. 83.

forthwith to bring the party to the gaol, or to the justice, according to the import of the warrant.

But if the time be unseasonable as in or near the night, whereby he cannot attend the justice, or if there be danger of a present rescue, or if the party be sick and not able at present to be brought, he may, as the case shall require, secure him in the stocks, or in case the quality of the person or the [120] indisposition so require, secure him in a house till the next day, or such time as it may be reasonable to bring him. [21]. 2 E. 4. 9 & 10. (†).

When he hath brought him to the justice, yet he is in law still in his custody, till either the justice discharge or bail him, or till he be actually committed to the gaol by warrant of the justice. 10 H. 4. 7. a. *Escape* 8.

And thus far concerning arrests by warrant or precept.

CHAPTER XIV.

CONCERNING THE OFFICE OF A JUSTICE, WHEN A PERSON CHARGED OR SUSPECTED OF A FELONY IS BROUGHT BEFORE HIM.

WHEN a party thus arrested for felony is brought to the justice of peace, he must either discharge, or commit, or bail him. [1]

But preparatory to these acts there are some things, that are required of him before he do either.

(†) *Vide supra*, p. 95, 96.

[21] The party arrested should not be treated with harshness beyond what is necessary for his safe custody; and therefore it has been held that a constable has no right to handcuff a prisoner, whom he has apprehended on suspicion of felony, unless he have attempted to escape or it be necessary to prevent him from escaping. *Wright v. Court*, 4 B. & C. 596; S. C. 6 D. & R. 623.

[1] The United States Judiciary Act, *Sess. 1. Chap. 20*, 1789, provides in sect. 33, That for any crime or offence against the United States the offender may by any justice or judge of the United States or any justice of the peace or other magistrate of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such State and at the expense of the United States, be arrested and imprisoned or bailed as the case may be for trial before such court of the United States as by this act has cognizance of the offence—and copies of the process shall be returned as speedily as may be into the clerk's office of such court together with the recognizances of the witnesses for their appearance to testify in the case, which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment. And if such commitment of the offender or the witnesses shall be in a district

1. By the statute of 1 & 2 P. & M. cap. 13. and 2 & 3 P. & M. cap. 10.[2] he is to take the informations upon oath of the prosecutor and witnesses[3] and put them into writing; and he is likewise to take the examination of the person accused, but this is to be without oath and put into writing.[4]

other than that in which the offence is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue and of the marshal of the same district to execute a warrant for the removal of the offender and the witnesses or either of them as the case may be to the district in which the trial is to be had.

[2] These two statutes of Philip and Mary are repealed by 7 Geo. IV. c. 64, which enacts "that two justices of the peace, before they shall admit to bail and the justice or justices, before he or they shall commit to prison any person arrested for felony or on suspicion of felony, shall take the examination of such person and the information upon oath of those who shall know the facts and circumstances of the case and shall put the same, or so much thereof as shall be material into writing; and every such justice shall have authority to bind by recognizance all such persons as know or declare any thing material touching any such felony or suspicion of felony to appear at the next court of Oyer and Terminer or Gaol-delivery or superior Criminal Court of a county palatine or Great Sessions or Sessions of the Peace, at which the trial thereof is intended to be, then and there to prosecute or give evidence against the accused; and such justices and justice respectively, shall subscribe all such examinations, informations, bailments and recognizances, and deliver or cause the same to be delivered to the proper officer of the court in which the trial is to be, before or at the opening of the court." And by sect. 3. the same provisions are made with regard to persons taken on a charge of *misdemeanor or suspicion thereof*.

[3] Before committing a *prima facie* case must be made out by witnesses entitled to a reasonable degree of credit. *Cox v. Cultridge*, 1 B. & C. 43-50; 2 D. & R. 86, S. C.; *R. v. Kiddy*, 4 D. & R. 734; 1 *Leach*, 202-309; *Morgan v. Hughes*, 2 T. R. 225-231; *ex parte Burford*, 3 Cranch, 448; *Commth. v. Ward*, 4 Mass. 497; (see *State v. Kelley*, 2 Bailey, 290, *per Earle, J.*) May be by one magistrate upon affidavit made before another, *exp. Bollman*, 4 Cranch, 139. Probable cause to commit may be established by evidence which would not be admissible on trial in chief, 1 *Burr's Trial*, 80; *U. S. v. Johns*, 4 Dall, 412; see 2 *Burns*, 464.

Upon the question of the propriety of a committing magistrate receiving in evidence an *ex parte* affidavit, C. J. Marshal says: "That a magistrate may commit upon affidavits, has been decided in the Supreme Court of the United States, though not without hesitation. The presence of the witness to be examined by the committing justice, confronted with the accused, is certainly to be desired and ought to be obtained, unless considerable inconvenience and difficulty exist in procuring his attendance. An *ex parte* affidavit, shaped perhaps by the person pressing the prosecution, will always be viewed with some suspicion and acted upon with some caution; but the Court thought it would be going too far to reject it altogether. If it was obvious that the attendance of the witness was easily attainable, but that he was intentionally kept out of the way, the question might be otherwise decided." *Burr's Trial*, 97.

[4] Here you may see (if I be not deceived) when the examination of a felon began first to be warranted amongst us. For at the common law, *nemo tenebatur prodere seipsum*, and then his fault was not to be wrung out of himself, but rather to be discovered by other means and men. *Lembarde Etren. b. 2. c. 7.*

The Constitution of the United States provides "that no person shall be compelled in any criminal case to be witness against himself;" and most of the State Constitutions contain a similar provision.

And these examinations and informations he is afterwards to deliver into the general sessions of the peace or to the gaol-delivery, as the case shall require; and because it may be unreasonable to take these informations or examinations presently, or possibly it may take longer time, the prisoner may be continued in the custody of the officer, or may be detained in the justice's house, or committed to some near safe place of custody, till the examinations can be taken.[5]

But this must be dispatched in some convenient time, [121] and therefore, *P. 43 Eliz. C. B. Scavage and Tateham*,^(a) in an action of false imprisonment brought by a person brought before the mayor of *Pomfret*, a justice of peace, upon suspicion of felony, the defendant could not upon the account of examination justify the detaining him in the justice's house nineteen days; but it was held, that he might detain him three days upon that account.[6]

2. It is fit to take a recognizance from the prosecutor to appear and prefer a bill of indictment, and also of the witnesses[7] to appear and give evidence at the next sessions of the peace or gaol-delivery, as the case shall require, if he shall find cause to commit or bail the prisoner; otherwise it is, if he shall discharge him.

These things being thus premised, as I said, the prisoner is either to be discharged, or committed, or bailed.

I. Touching the discharge of a prisoner. If a prisoner be brought before a justice of peace expressly charged with felony

(a) *Cro. Eliz.* 829. *Vide Part I. p. 586.*

[5] A prisoner when examined before a justice on a charge of felony is not entitled as of right to have a person skilled in the law or any other heard as an advocate in his behalf, it being a preliminary investigation only and not conclusive on him; and the recent act of 6 & 7 Will. IV. c. 114, allowing a prisoner counsel, does not alter the law in this respect. It is allowed frequently as matter of courtesy. *R. v. Brown*, 3 B. & A. 432; *Cox v. Coleridge*, 2 D. & R. 86; 8 B. & C. 37; *Daubney v. Cooper*, 10 B. & C. 237; and see *R. v. Staffordshire*, 1 Chil. 218; *Collier v. Hicks*, 2 B. & Ad. 663. The whole proceedings of the examination should be in the presence and hearing of the accused. 1 *Leach*, 202. 309. 500; *R. v. Paine*, 1 *Ld. Raym.* 729; *R. v. Commins*, 4 D. & R. M. C. 42.

The Constitution of the United States provides, that in all criminal prosecutions the accused shall have the assistance of counsel for his defence.

[6] *Hutchinson v. Loundes*, 4 B. & Ad. 118; *Still v. Walls*, 7 *East*, 533. Reasonable time a question for jury, *Cave v. Mountain*, 1 *Scott N. R.* 132; 1 *M. & Gr.* 275. S. C.; *Davis v. Capper*, 10 B. & Cress. 32; *Edwards v. Ferris*, 7 C. & P. 542; *Kendal v. Roe*, 12 *How. St. Tr.* 1378. Stands on different footing from commitment for trial, per *Lord Eldon*, 3 *Dow.* 183—4; see *Burr's Trial*, p. 165.

[7] See *ante chap. 7. p. 52*, in note.

by the oath of a party, the justice cannot discharge him, but must bail or commit him.

If he be charged with suspicion only of felony, yet if there be no felony at all proved to be committed, or if the fact charged as a felony be in truth no felony in point of law, the justice of peace may discharge him, as if a man be charged with felony for stealing of a parcel of the freehold, or for carrying away what was delivered to him, and such like, for which tho there may be cause to bind him over as for a trespass, the justice may discharge him as to felony, because it is not felony; *Kelw. f. 34: 44 Assiz. 12. Poulton de Pace 146. b.* But if a man be kild by another, tho it be *per infortunium* or *se defendendo*, (which is not properly felony,) or in making an assault upon a minister of justice in execution of his office, (which is not at all felony,) yet the justice ought not to discharge him, for he must undergo his trial for it; and therefore he must be committed, or at least bailed.

II. As touching commitment or imprisonment of a party brought before a justice for felony, or suspicion [122] thereof, these things are to be observed:

1. The commitment must be by writing under the seal of the justice.[8]

And therefore altho a justice may by word of mouth arrest a person for a breach of the peace done in his presence, yet in that case the commitment of him ought to be a *mittimus* under seal; thus it was resolved in *Sandford's case*,(*) *P. 23 Car. 1. B. R.* but agreed he may detain him in his custody, till a warrant can be made.[9]

And herein the power of a justice differs from the power of a court; [10] for the court of king's bench may commit by order, and so may the court of sessions of the peace, because there is or ought to be a record of the commitment.

Nay in chancery, if an order be made for commitment of a person, till he enter into bond, &c. the warden of the *Fleet* may justify the imprisonment by virtue of that order. *T. 39. Eliz. B. R. 2 Rol. Abr. p. 599. Taylor and Beal.*

2. The *mittimus* ought to have these circumstances. 1. It

(*) *Part I. p. 612.*

[8] *Somervell v. Hunt*, 3 *Har. & McHen.* 113; *State v. Caswell*, *Charlt.* 280; *contra State v. Vaughan*, *Harper*, 313.

[9] *Hutchinson v. Lowndes*, 4 *B. & Ad.* 118; *Still v. Watts*, 7 *East*, 533.

[10] The Circuit Court sitting as a court has authority to commit a person charged with an offence against the United States although a grand jury is in session before whom a bill may be presented. 1 *Burr's Trial*; 79, 80.

must contain the certainty of the cause,[11] and therefore if it be for felony, it ought not to be generally *pro feloniam*, but it must contain the especial nature of the felony briefly, as *for felony for the death of J. S.* or *for burglary in breaking the house of J. S. &c.* and the reason is, because it may appear to the judges of the king's bench upon an *habeas corpus*, whether it be felony or not:(†) and likewise by the statute of 3 H. 7. cap. 3. the sheriff is to make a calendar of the prisoners in his gaol, and deliver it to the justice of gaol-delivery signifying the prisoners and their causes: *vide 2 Co. Instit.* 52 & 591. 2. It is fit to mention the name of the justice, and his authority in the beginning of the *mittimus*, tho this is not always necessary, for the seal and subscription of the justice to the *mittimus* is sufficient warrant to the gaoler:[12] *vide supra*(**) & *Dalt.* 355 & 383. for it may be supplied by averment, that it was done by the justice. 3. It must have a certain date of the year [123] and day.[13](*) 4. It should have an apt conclusion,[14] namely to detain him till he be thence delivered by due course of law. 2 *Co. Instit. ubi supra*.(††)

But altho it be true, that these things are regular and fit, namely the cause, the justice committing, the date, the apt conclusion, yet I am far from thinking the warrant void, that hath not all these circumstances.[15]

(†) *Vide supra*, p. 111.

(*) *Supra*, p. 111.

(**) Part I. p. 577.

(††) *Vide Part I. p. 584.*

[11] *Groenvelt's case*, 1 *Ld. Raym.* 213; *R. v. Kendal*, *ib.* 67; *Addie's case*, *Cra. Jac.* 219; *R. v. Despard*, 7 *T. R.* 736; *R. v. Judd*, 2 *T. R.* 25; *R. v. Croker*, 2 *Chit. Rep.* 138; *R. v. Lowden*, 7 *Dowl.* 538; *R. v. Bartlett*, 12 *L. J. Rep.* (N. S.) *M. C.* 127; 2 *Dowl. (N. S.) S. C.*; *Cropper v. Horton*, 8 *D. & Ry.* 168. But not construed as strictly as commitment in execution. *R. v. Gourlay*, 7 *B. & Cres.* 669; *R. v. Marks*, 3 *East Reps.* 157; *Cald.* 295. Commitment for high treason without expressing species of good. *Harvey of Coomb's case*, 10 *Mod.* 334; *R. v. Wyndham*, 1 *Str.* 3; *Com. v. Ward*, 4 *Mass.* 497; *ex parte Burford*, 3 *Cranch*, 448.

[12] *Ken. R.* 122; *Mayhew v. Locke*, 2 *Marsh. Rep.* 377.

[13] *In re Fletcher*, 13 *L. J. (N. S.) M. G.* 16. See *Newman v. Hardwicke*, 3 *Nev. & Per.* 368. A mistake in date might be fatal. *Exp. McGee*, 6 *Mad. Rep.* 206; *Salt's case*, 13 *Vesey*, 361.

[14] *R. v. Nash*, 2 *Bla. Reps.* 806; *Cuth.* 152; *exp. Goff*, 3 *M. & Sel.* 203; *Groome v. Forrester*, 5 *M. & Sel.* 314.

[15] *Davis v. Capper*, 10 *B. & Cres.* 37; *Morgan v. Brown*, 4 *Ad. & El.* 516; *Skingley v. Surridge*, 11 *M. & W.* 503; *R. v. Marks*, 3 *East*, 157; *R. v. Taylor*, 7 *D. & R.* 822; see *exp. Addis* 1 *B. & C.* 90. Held not to be indispensable that it should set forth that the charge was on oath. *Com. v. Murray*, 2 *Virg. Cas.* 504. Sufficient if it appear on the face of it that authority is given to detain the prisoner on some charge of a criminal nature though not set forth with technical accuracy. 2 *Bailey*, 290.

A commitment need not be drawn with the same precision as an indictment.

And therefore the justification in false imprisonment against the gaoler may be good by virtue of such a warrant; and it seems to me, (contrary to the opinion of my lord *Coke*, *ubi supra*,) that if an escape be suffered willingly by the gaoler upon such a general warrant, it will be felony in him: *vide quæ supra*, cap. 54. *Part I. p. 609. De frangentibus prisonam.*(c)

And therefore if the conclusion of the *mittimus* be to detain him till further order by the justice, it is true it is an unapt conclusion, and therefore binds not up the hands of the justices, to whom it may belong, to bail or deliver him, as the case shall require; but the commitment is notwithstanding good, if there be any tolerable certainty in the body of the warrant for what it is, as for felony generally, tho the particular is best to be expressed.

3. Regularly the commitment is to be to the common gaol of the county, or if the offense be committed and the party taken within a franchise that hath a gaol, (as the *Gatehouse* at *Westminster*,) then to the gaol of the franchise, by the statute of 5 *H. 4. cap. 10.*

Only sometimes it hath been used by the justices of peace to send such prisoners, which are bailable and have not their bail ready, to some private prison, as the *New Prison* in *Middlesex* for some short time, till they can procure their bail: but this hath always been disliked by the justices of the king's bench and gaol-delivery as inconvenient, and not agreeable to the law.(d)

4. If the prisoner be bailable, yet the justice is not bound to demand bail, but the prisoner is bound to tender it, otherwise the justice may commit him;[16] *quod vide* 14 *H. 7.*

10. *a. per Fineux*, accordingly adjudged *T. 40 Eliz.* [124] *C. B. Collin's* case; and so of a sheriff, that hath taken a man by *capias*, where he is bailable.

Thus far touching commitment of an offender.

But in some cases the offender is neither discharged nor committed, but bailed, and that comes next to be considered.

But because the business of bail is large and various, I shall refer that to the next chapter.

(c) See also *Part I. p. 595.*

(d) See the case of *Kendal and Roe*, *State Tr. Vol. IV. p. 862. & supra, Part I. p. 585. in notis.*

R. v. Remnant, 2 *Leach C. C.* 583; 1 *East P. C.* 420; 5 *T. R.* 169; *Nolan*, 205. Need not allege the offence to be feloniously done. *R. v. Judd*, 1 *Leach C. C.* 484; 2 *T. R.* 255. When under a statute must follow the statute. *R. v. Wall*, 1 *Alcock & Naper*, 178.

[16] 2 *Hawkins*, 90.

CHAPTER XV.

CONCERNING BAIL AND MAINPRISE.

TOUCHING bailing of felons, &c. there will be these things inquirable. 1. What it is, and the nature and kinds of it. 2. In what cases it may be, and in what not. 3. By whom.(a) 4. In what manner it is to be done, by writ or without writ.(b) 5. The penalty of erring therein.(c)

Touching the *first*, namely the nature of bail.

Bail and mainprise are used promiscuously oftentimes for the same thing, and indeed the words import much the same thing, for the former is *traditus J. S.* and the other is *manucaptus per J. S.*

But yet in a proper and legal sense they differ. 1. Always mainprise is a recognizance in the sum certain, but bail is not always so. 2. He, that is delivered *per manucaptionem* only, is out of custody; but he that is bailed, is in supposition of law still in custody, and the parties that take him to bail are in law his keepers, and may re-seize him to bring him in;[1] and therefore if a man be let to mainprise, suppose in the king's bench, an appeal or other suit cannot be brought against him as *in custodia marescalli*, but if he be let to bail, he is in supposition of law still *in custodia marescalli*, 38 E. 3. Mainprise 12. 36 E. 3. *Ibidem* 13. 32 H. 6. 4. a. Protection 13. [125] and accordingly the books of 21 H. 7. 20. b. *per Fineux*, and 9 E. 4. 2. a. that seem to differ, are to be understood. 3. Tho sometimes the recognizances themselves both in bail and mainprise are in sums certain, as shall be shewn, yet the entry on record in the one case is *deliberatur per manucaptionem*, and in the other case *traditur in ballium*.

But now for the kinds of bail properly so called, it is of these kinds.

1. Sometimes it is in no sum certain at all, but *traditur in ballium* to J. S. and this is the usual form in all bails in civil actions in the king's bench; and antiently it was so also in criminal cases, tho now, as shall be shewn, it differs.

(a) *Infra*, cap. 16. & sub fine cap. 17.

(c) *Infra*, sub fine hujus capituli.

(b) *Infra*, cap. 17.

[1] At anytime (as on a Sunday) or at any place; and in surrendering the principal they may command the co-operation of the sheriff and any of his officers. Anon. 6 Mod. 231, Rol. Rep. 99; see *ex parte Lyne*, 3 Stark. 132; *Horn v. Swinford*, 1 Dougl. N. F. C. 20.

And of this kind was the antient form of that bail, which was *corpus pro corpore*, which now is rarely used in that form, and the reason why that is disused is, because there was antiently a loose opinion, that he, who was bail in this manner for a felon, was to be hanged, if he brought not in the principal to keep his day, 33 *E. 3. Mainprise* 12. but the truth is, all his punishment is to be fined for his default.[2] *Crompt, Justice. f. 157. a. 11 H. 6. 31. b.*

And so in civil actions; where this kind of bail is sometimes in use, as appears 27 *H. 8. 11 & 12. 21 H. 7. 20. b.* the bail is amerced, if he have not the principal at the day.

2. Sometimes the bail is only a recognizance in a sum certain for the appearance of a felon, and this is usual, *viz.* the principal in double the sum; as for instance in 40*l.* or more, the sureties each of them in 20*l.* a-piece *ad comparandum & standum recto in curiâ de latrocinio prædicto secundum legem, &c. Dalt. cap. 114. p. 305.*

The sureties ought to be at least two men of ability,[3] and their number and sufficiency and the sum of the recognizance is much in the discretion of him that is to take it, and therefore he may examine them upon oath;[4] but how these are punishable that take insufficient bail, shall be said hereafter.[5]

[2] *R. v. Dalton, 2 Stra. 911.*

[3] Now it is an invariable rule to require four bail in cases of felony. *R. v. Shaw, 6 D. & R. 154.*

[4] *Bennett v. Watson, 3 M. & Selw. 1; R. v. Shaw, 6 D. & R. 154.*

Every housekeeper possessed of sufficient property to answer the required responsibility may be bail. The defendant's attorney may be bail for him. *R. v. Bowes, Doug. 466. n.*

Not a person convicted of an infamous crime, as perjury. *R. v. Edwards, 4 T. R. 440.*

Nor a married woman. *Styler, 369; 2 Hawk. ch. 15.*

In general no notice of bail is requisite, but justices may if they think fit (and in strong cases it is usually done) order that a reasonable notice of bail, usually twenty-four or forty-eight hours according to circumstances, shall be given to the prosecutor. 1 *Burn, 326.*

When neither the husband of a feme covert nor her next of kin can be discovered, service of a rule nisi for bailing a defendant on a charge of manslaughter may be made on the coroner. *R. v. Williams, 8 Dowl. P. C. 301.*

The principle which should guide justices in admitting an accused party to bail or committing him for trial should always be the probability of his appearing to take his trial and not his supposed guilt or innocence. *R. v. Scarfe, 9 Dowl. 553.*

The enormity of his offence; the rank and station of the accused; the presumption of his guilt or innocence; the severity of the punishment for the crime charged to have been committed, may all be taken into consideration in estimating this probability, but do not individually or collectively constitute the legal grounds on which justices should take or refuse bail. 1 *Burn, 322.*

[5] And if a person who has power to take bail be so far imposed upon as to suffer a prisoner to be bailed by insufficient persons, it is said, that either he or

The sureties *ad standum juri* doth import also, that he shall plead to the felony; and therefore before the statute of *Marlbridge*, cap. 28. (b) if the felon had stood upon his *privilegium clericale* and would not answer the felony, his bail had been amerced, which is remedied by that statute.

3. The third sort of bail is that, which is indeed the true and regular bail, which is not only a recognizance in a sum certain, but also a taking to bail, the true form whereof is contained in *Lambert's Justice*, Lib. I. cap. 23. p. 264. Memorand' quod die, anno, &c. coram, &c. venerunt A. & B. & ceperunt in balliam J. S. captum & detentum pro suspicione cujusdam felonie usque proximam generalem gaolæ deliberationem in comitatu prædicto tenend', & assumpserunt, viz. quilibet eorum sub pœna 20l. de bonis & catallis, terris & tenementis eorum & cujuslibet eorum ad opus dicti domini regis levand', si prædictus J. S. ad eandem proximam gaolæ deliberationem non personaliter comparebit coram justiciariis dicti domini regis ad dictam gaolam deliberand' assignatis ad respondendum dicto domino regi tunc & ibidem super præmissis, or super iis, quæ ad tunc & ibidem ipsi objiciuntur, or rather according to the antient form ad standum recto de latrocinio prædicto secundum legem & consuetudinem regni Angliæ. Dat. sub sigillis nostris, die, anno, &c. Vide F. N. B. 260. Crompt. 157. b.

But the seal need not be, for he is a judge of record, only his hand simply subscribed, or subscribed *capt. & cognitus die & anno supradicto coram* Math. Hale.

● This is the form of a bail, where the principal is either an infant or in prison, and so absent; and thereupon a warrant issues under the hand and seal of him that takes the bail for his enlargement, called a *liberate*.

But if he be bailed by a justice of peace before commitment, or if committed and brought into the court of king's bench or sessions to be bailed, then the party himself is also bound; [6]

(b) 2 Co. Instit. p. 160.

any other person who hath power to bail him, may require the party to find better sureties and to enter into a new recognizance with them, and may commit him on his refusal, for that insufficient sureties are as no sureties. 2 Hawk. 88.

After the defendant has been admitted to bail the court will not on affidavit of aggravating facts order the bail to be increased. *R. v. Solter*, 2 Chit. Reps. 109.

[6] The recognizance need not be signed by any of the parties bound in the condition. 2 Hawk. ch. 15, § 83; *Com. v. Mason*, 3 Marsh. (Kentucky) 456. If the recognizance be intended specifically for a certain crime it should be so stated, if stated generally it will hold him to answer any crime of which he may be accused. *R. v. Ridpath*, 10 Mod. 152. Where by the sureties alone held valid. *Murray v. State*, 1 Blackf. 236. Must be signed in New York by statute, 2 R. S. 746; see 10 Wend. 471.

and sometimes the recognizance is simple with a condition added for his appearance; and sometimes the condition is contained in the body of the recognizance, *ut supra*: Only it is to be remembered, that when any person is bailed for any misdemeanor either upon the return of an *habeas corpus* or [127] otherwise, the return or record ought to be first filed, and a *committitur marescallo* entred, and then bail taken; for all persons, that are bailed in the king's bench, are *de facto*, or in supposition of law first supposed to be *in custodia marescalli*.

The advantage of this kind of bail is this, that it is not only a recognizance in a sum certain, but also a real bail, and they are his keepers, and may be punished by fine beyond the sum mentioned in the recognizance, if there be cause, and may re-seize the prisoner, if they doubt his escape, and bring him before the justice or court, and he shall be committed, and so the bail be discharged of his recognizance. [7] 36 E. 3. *Mainprise* 13. 32 E. 3. *Mainprise* 23. *Crompt. Justice*, f. 157. a.

Touching the *second*, in what cases a person is bailable; [8]

[7] The bail are not entitled to have their recognizance discharged without paying the costs incurred. *R. v. Lyon*, 3 Burr. 1461; *R. v. Finmore*, 8 T. R. 409; *R. v. Turner*, 15 East, 570. On a verdict of acquittal the defendant's recognizance is considered *ipso facto* void and his bail discharged without further entry. *Mills v. McCoy*, & *Cowan*, 410; see *Keefaver v. Com.* 2 Penn. 240.

It is essential to the breach of a recognizance for the prisoner's appearance that he should be solemnly called before his default is entered. *Dillingham v. U. S.* 2 W. C. C. 422. The original recognizance need not (in Vermont) be returned to the court, the return of a copy is enough. *Treasurer v. Pierce*, 2 Chp. 106.

A justice may take a recognizance with sureties for the appearance of a party charged with a bailable offence at an adjourned examination; and if he do not appear he and his sureties may be called and a proper entry of their default made; but the justice need not render judgment that their recognizance is forfeited. *Potter v. Kingsbury*, 4 Day, 98; see 2 W. C. C. 422.

[8] The Constitution of the United States contains a provision as 1 W. & M. Sess. 2, "that excessive bail shall not be required."

The United States Judiciary Act, sess. 1, chap. 20, 1789, provides in sect. 33, That upon all arrests in criminal cases bail shall be admitted, except when the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence and of the evidence and the usages of law. And if a person committed by a justice of the supreme or a judge of a district court for an offence not punishable with death, shall afterwards procure bail and there be no judge of the United States in the district to take the same, it may be taken by any judge of the supreme or superior court of law of such State.

The act of 1793, sess. 2, chap. 22, provides sect. 4, That bail for appearance in any court of the United States, in any criminal cause in which bail is by law allowed, may be taken by any judge of the United States, any chancellor, judge of a supreme or superior court or chief or first judge of a court of common pleas of any State or mayor of a city in either of them and by any person having au-

that is accused or indicted of felony or accessary, or in relation thereunto.

I shall not meddle with bailing of prisoners in civil actions or for offenses less than felony by acts of parliament, only thus much.

Regularly in all offenses either against the common law or acts of parliament, that are below felony, the offender is bailable, unless, 1. He hath had judgment. 2. Or that by some particular or special act of parliament bail is ousted.

What acts of parliament oust bail in particular offenses against those acts is not my purpose to declare, they are very well collected by Mr. *Dalton*, cap. 114. and Mr. *Crompton de pace regis*, f. 154. b. & sequentibus.

In relation to capital offenses there are especially these acts of parliament, that are the common land-marks touching offenses

thority from a circuit court or the district courts of Maine or Kentucky to take bail; which authority revocable at the discretion of such court, any circuit court or either of the district courts of Maine or Kentucky may give to one or more discreet persons learned in the law in any district for which such court is holden, where from the extent of the district and remoteness of its parts from the usual residence of any of the beforenamed officers, such provision shall in the opinion of the court be necessary. *Provided* that nothing herein shall be construed to taking bail in any case when the punishment for the offense may be death; nor to abridge any power heretofore given by the laws of the United States, to any description of persons to take bail.

The constitutions of the States of Maine, Rhode Island, Connecticut, New Jersey, Pennsylvania, Delaware, Kentucky, Tennessee, Ohio, Indiana, Illinois, Missouri, North Carolina, Alabama, Mississippi and Louisiana contain a provision to the effect that "all prisoners shall be bailable by sufficient sureties unless for capital offences where the proof is evident or the presumption great."

In New York the supreme court have authority to let prisoners to bail in all criminal cases whatever. *Tyler's case*, 5 *Cott.* 39.

So in South Carolina. 1 *Const. Rep.* 242.

It would seem a safe rule to refuse bail in a case of malicious homicide, where the judge would sustain a capital conviction pronounced by the jury on evidence of guilt such as is exhibited on the application to bail: and to allow bail where the prosecutor's evidence is of less efficacy. *Ex parte Chauncey*, 2 *Ash. (Penna.)* 227.

No justice of the peace in Pennsylvania can admit to bail in case of felonious homicide, whether of murder or manslaughter, of robbery, burglary, rape, arson or horse stealing. *Id.*

A justice of the peace in Massachusetts has no authority to bail in case of homicide and the recognizance taken is void. *Com v. Loveridge*, 11 *Mass.* 337.

In Virginia a justice of peace may bail on charge of felony, if only a slight suspicion of guilt attaches to the prisoner. *Tyler v. Greenlaw*, 5 *Rand.* 711.

Bracton gives the law as to bailing prisoners to have been (Henry III.) that where one was accused of a breach of the peace only or of felony or other crime less than homicide, he should be admitted to bail until the coming of the justices into the county. But where the prisoner was charged with homicide, he could not be admitted to bail, but was entitled upon petition to his writ of inquest de odio et atia, and if the jury upon that inquiry found in his favor he was entitled to be bailed until the coming of the justices for his trial, but if such inquest found against him, he must remain in prison to await his trial. *De Corona*, lib. 3. cap. 8.

bailable or not bailable, viz. 3 *E.* 1. or *Westm.* 1. cap. 15. 34 *E.* 3. cap. 1. 23 *H.* 6. cap. 10. 1 *R.* 3. cap. 3. 3 *H.* 7. cap. 3. 1 & 2 *P. & M.* cap. 13. and 2 & 3 *P. & M.* cap. 10.

As to the statute of 3 *E.* 1. it declares, who are bailable and who not as well in other cases, as in cases capital.

But at that time few were concerned in bailing of prisoners, but the sheriff, in whose custody they most [128] commonly were, and such subordinate officers, that either under the sheriff or as bailiffs of liberties had the custody of prisoners, [as appears from the words of the statute,] *Et pur ceo que viscounts & autres queux ont prise & retenus prisoners*: And therefore still the statute did not extend to courts of justice, much less to the court of king's bench: vide 2 *Co. Instit.* p. 185. 186. *super hoc statutum*; neither doth this statute singly of itself extend to justices of the peace, for they were not in being till 1 *E.* 3. and therefore the statute of 1 & 2 *P. & M.* cap. 13. especially makes this statute of 3 *E.* 1. a direction touching bailing of offenders.

And therefore it seems also upon the same reason the statute of 27 *E.* 1. cap. 3. *de finibus levatis*, that directs and authorizeth justices of gaol-delivery to inquire of sheriffs and others, that have let out of prison by replevying persons not replevisable, or have offended against the statute of *Westminster*, and to punish them according to that statute, extends not to courts or justices of the peace, but only to sheriffs and subordinate officers.

And the truth is, it could not be well applicable to any but them, for as all writs of *homine replegiando*, *de manucaptione*, & *de odio & atia* were directed to the sheriffs, so in most cases what was to be done in those times for bailing of prisoners was most commonly to be done by the sheriff.

This statute declares, 1. Who were not bailable by the common law. 2. Who from thenceforth should not be bailable; and 3. Who should be bailable, and inflicts punishment upon sheriffs and bailiffs bailing those that are not replevisable, and not bailing those that are replevisable.

And this act extends not only to such bailments as might be *virtute officii*, but also to bailments by force of the common writ *de homine replegiando* or *de manucaptione*; whereof hereafter.

My lord *Coke* in his comment upon this chapter(d) hath given us the substance and intent of this statute, which I shall therefore but in effect transcribe.

(d) 2 *Co. Instit.* p. 186. & seq.

I. As to those that were irreplevisable at common law; [9] I mean before the statute of 3 E. 1. (for possibly more antiently all offenders were replevisable,) they are of four sorts.

1. *For the death of a man.*

At this time there was held little difference between murder and manslaughter, but only in degree; for till 23 H. 8. clergy was allowable in the one as well as in the other, nay, at this day, if the indictment run only *interfecit & murdravit* without *ex malitia præcogitata*, the prisoner hath clergy.

And as to the point of bail no difference was at common law, nor after the statute of 3 E. 1. till later statutes, (*de quibus infra*,) between murder, manslaughter, or the killing of a man *se defendendo*, or *per infortunium*, for they, that could not bail in murder, regularly could not bail in the other three cases.

And this held universally as to bailment by the sheriff or by the justices of peace; but as to others, it had some exceptions.

The court of king's bench might and still may bail in any case whatsoever, [10] even in high treason or murder, for the court is held in law *coram ipso rege*. 4 Co. Instit. p. 71. 2 Co.

[9] For by the common law a man accused or indicted of high treason; of any felony whatsoever, was bailable upon good surety; for at the common law the gaol was his pledge or surety that could find none, and this appeareth by Glanvil who saith, *Is qui accusatur ut prædiximus, per plegios salvos et securos solet attachiari, aut si plegios non habuerit in carcerem detrudi*; so as a man by the common law was bailable for any offence, until he were convicted: and this seemeth to be the old law of the land before the conquest, viz: *Ingenuus quisque fide jussores qui animi (si quando in crimen vocetur) jus suum cuique tribuere quam paratissimum fore præstant, fidissimos adhibeto*. 2 Inst. 189. Sed quære et vide Glanv. Lib. 14, caps. 1 and 3, where he excepts from bail homicide "*ubi ad terrorem aliter statutis est*." See *Mirreour*, chap. 5.

[10] *R. v. Marks*, 3 East, 163; *Rudd's case*, 1 Cowp. 333; 5 T. R. 169. They do not usually bail in case of felony unless it appear doubtful whether any offence has been committed; *R. v. Judd*, 2 T. R. 257; *R. v. Remnant*, 5 T. R. 169; and not for defect in mittimus. 3 East, 163. Bail refused where the party had been committed for suspicion of murder in a foreign country. *R. v. Hutchinson*, 3 Kobb, 785; 2 Vent. 314. Not usually for ill health of party; *R. v. Shuckburg*, 1 Wils. 29; but when his life is in danger, see *Ld. Aylesbury's case*, 1 Salk. 103; *U. S. v. Jones*, 3 Wash. C. C. 224. Not where the complaint is constitutional or the illness arising from the act of the prisoner. *R. v. Wyndham*, 1 Str. 4. When he is unable to defray the expenses of being brought to Westminster, if it appear that he ought to be bailed, a rule will be granted to shew cause why he should not be bailed by a magistrate in the county with a *certiorari* to return the depositions before the king's bench. *R. v. Jones*, 1 B. & Ald. 909; see *R. v. Brooker*, 2 Dougl. P. C. 446; *R. v. Massey*, 6 M. & Selw. 108; without an affidavit of poverty. *R. v. Gregory*, 9 Dougl. P. C. 129.

By 1 & 2 Vict. ch. 45, the judges of the common pleas and exchequer have the same powers of bailing with those of the king's bench.

A person charged with treason may be admitted to bail but not without very

Instit. p. 186. but this is in the discretion of the court, and none can challenge it *de jure*.

And this bailment in the king's bench may be upon an original indictment before them in the county where they sit, or upon an indictment removed by *certiorari*, or upon a prisoner removed by *habeas corpus* before or after an indictment taken; *vide infra*.

In some cases justices of gaol-delivery may bail in case of the death of a man.

1. If a man be found guilty of a death *se defendendo*, or *per infortunium* upon his trial, the justices of gaol-delivery may certify the matter into *chancery*, that the party may sue his pardon of course, and in the mean time bail him till the next sessions. 3 *E. 3. Coron.* 361.

And the same law it is, if the coroner's inquest only find it *se defendendo*, such inquisition shewing the [130] special matter, as it ought, is good, *Stamf. P. C. cap.* 7. *f. 15. b. 26 Eliz. Holmes's case, Crompt. de pace, f. 153. b. & 28. a.* and the reason of the book of 12 *E. 3.* cited by *Crompton*, that in an indictment before the coroner *se defendendo*, the words *se defendendo* were void and stricken out, is not because they were against the king, but because they were too general.

2 *Co. Instit. super stat. Glouc. cap.* 9. p. 316. an indictment *se defendendo* is good before justices of gaol-delivery, but it is there said it is not good before justices of peace; *de quo supra, p. 45.* and therefore upon such an indictment before the coroner *se defendendo* specially, the justices of gaol-delivery may bail the party till the next sessions to procure his pardon of course, as well as if it had been found upon his trial; and so it was done 26 *Eliz.* in *Holmes's case, Crompt. 153. b. vide Ap-Rice's case, 19 H. 7. Kelw. 53. a. Crompt. ibidem.*

2. If a man be convicted of manslaughter, and hath a pardon to plead, which the justices of gaol-delivery see in the interval of the session, they may bail him, (notwithstanding his conviction and that of manslaughter,) to another session to plead his pardon. 2 *E. 6. B. Mainprise* 24. *Crompt. 153 b.*

3. If a person be brought before the judges of gaol-delivery upon suspicion of murder, but before commitment or indict-

strong reasons. *U. S. v. Hamilton, 3 Dall. 18; U. S. v. Stewart, 2 Dall. 345; see 1 Burr's trial, 306—312.*

An accomplice in felony was held to bail the principal not being taken. *Anon. Left. 554.*

A judge will not admit a party to bail after the grand jury have returned a true bill against him for murder. *R. v. Chapman, 8 C. & P. 556; see R. v. Guttridge, 9 C. & P. 228.*

ment [it appears] upon examination of the fact by the justices of gaol-delivery, that he is not guilty, (tho in truth a felony were committed,) the justices of gaol-delivery may bail him to another sessions: *vide* 31 *Eliz. in case de Salford, Crompt.* 154. *a.*

But I am not of the mind that the same judge [*Shuttleworth*] was of that if he be convict upon a trial against the opinion of the judge, that he can bail him to sue his pardon; but all he may do is to reprieve him before judgment, and certify for him for a pardon.

And therefore it seems to me there is no difference between this case and that of *Dyer* 179. *a.* where a man is convict, and it is doubted whether he be within clergy, [131] yet he remaineth not bailable.

4. If a man be indicted of murder at the sessions of gaol-delivery, and prays his trial, but the prosecutor for the king is not ready with all his evidence, the judge may respite his trial till another sessions; and tho he be not bound to bail him, yet if he do find that it is no contrivance of the prisoner to surprise the prosecutor, but that it is merely the neglect of the prosecutor, or that his pretense is merely a delay to continue the party in prison, I have known it often practised at *Newgate*, and elsewhere, for the justices of gaol-delivery to bail the prisoner till another sessions, if it be far off, and upon circumstances considered. [11]

And yet in none of these cases neither justices of peace nor sheriff can bail; but how far they may bail in cases of manslaughter shall be said hereafter, when we consider the subsequent statutes.

And thus far at present for bailing in case of the death of a man.

2. The *second* case where a man was not bailable by the common law, is, where a man is taken *per mandatum domini regis*: this is not intended of the personal command of the king, for regularly as the king cannot in person arrest or imprison, so he cannot command another to imprison, but it must be done by some order, writ, or precept, or process of some of his courts. 16 *H. 6. Monstrauns de fait* 182. 1 *H. 7. 4. b. 2 Co. Instit. super statutum Westminst.* 1 cap. 15. p. 187.

Nay, altho such a mandate be by commission under the great seal, it is void, 42 *Assiz.* 5. therefore the *præceptum*, or *mandatum domini regis* in this act, is intended of the process of

[11] And now the right of a prisoner by the seventh section of the Habeas Corpus act, 31 *Car. 2. cap. 2.*

law issuing out of the king's courts according to their several jurisdictions, 2 *Co. Instit. super Mag. Chart. cap.* 29. and *Westm.* 1. *cap.* 15. But if intended of the king's personal command, tho such a person so taken be not bailable by the common writ *de homine replegiando*, yet he is bailable by the court of king's bench or chancery upon an *habeas corpus*; *de quo infra*, 2 *Co. Instit. p.* 55. 187.

3. *Thirdly, Or of the justices, viz.* by writ of process issuing according to law within their several [132] jurisdictions; for altho these were bailable in many cases by the courts that issued the process, yet they were not bailable by the common writ *de homine replegiando*, but are excepted therein, nor by the sheriff *virtute officii* till the statute of 23 *H. 6. cap.* 10.

4. *Fourthly, Or for the Forest*; persons imprisoned by the justice in *eyre* in the forest, are not replevisable by the common writ *de homine replegiando*.

II. The second part of this statute is enacting or declarative who are not bailable; but so far as this statute looks, it only concerns the sheriff and bailiffs, and the common writs of *homine replegiando*, or *de manucaptione*, which are directed to the sheriff, tho afterwards it was made the rule in many things to justices of peace, &c. by the statutes of 1 & 2 *P. & M.* and 2 & 3 *P. & M. de quibus infra*.

And the cases wherein bail is restrained by this statute, are thirteen in number, some in respect of the heinousness and weight of the offense, as treason, burning of houses, breaking of prison, &c. and the rest upon the great evidence and probability of guilt, as persons outlawed, &c. but I shall follow them in the order that the statute sets them down.

1. Persons outlawed; for outlawry is an attainder of felony, and [the outlaw] is presumed guilty, because he withdraws himself from the process of law.

And upon the same reason it is, that a person convict of felony, while the judge adviseth upon his clergy, is not bailable, because he is convicted, *Dy.* 179. *a.* Nay, tho he be convicted against the direction of the court, [12] he is not

[12] The Court will not between conviction and judgment bail the offender without the consent of the prosecutor. 4 *Burr.* 2545. 2539. See *McNeil's* case, 1 *Ceines (N. York)* 72; *State v. Ward*, 2 *Hawke. N. Ca. Reps.* 443.

On appeal to the Supreme Court from conviction in a court below, it is matter of discretion in the appellate Court whether the prisoner shall be bailed. *State v. Ward*, 2 *Hawke.* 447.

A prisoner convicted of larceny upon slight evidence and against the charge of the Court was admitted to bail until the day in bank when his counsel should move for a new trial. *Respub. v. Jacobs*, 1 *Smith's Laws (Penna.)* 57.

bailable against the opinion of *Shuttleworth*, 31 *Eliz. Crompt. f. 154. a.*

And therefore if the ordinary had had a clerk convict in his custody, if the ordinary let him to bail, he was punishable: *vide 15 H. 7. 9. a.*

But if a man be outlawed for felony, and be taken upon a *capias utlegatum*, and plead in avoidance of the outlawry against him that he is of another place, and so not the person outlawed, or bring a writ of error to reverse the out-
[133] lawry and assign his errors, the court of king's bench may bail him; and it is not unusual so to do, whether the outlawry be upon an appeal or an indictment.

If a man be indicted or appealed for such an offence, wherein bail may be taken, the indictment or appeal does not hinder his bailment, because it induceth no sufficient presumption of his guilt; if he were bailable before indictment, he is bailable after, 2 *Co. Instit. super stat. Westm. 1. cap. 15. and statutum ipsum F. N. B. 249. 22 Assiz. 94.* but not allowed till he hath pleaded to the indictment, 16 *Assiz. 13. 29 Assiz. 44.*

But if a man be indicted before justices of a higher jurisdiction, as before justices of *oyer and terminer*, he cannot be bailed by justices of peace, for they cannot proceed upon an indictment taken before superior judges, tho otherwise the cause might be within their cognizance.

2. Persons that have abjured for felony, are not bailable, for they are attainted in law.

3. Approvers in felony are not bailable, because they do confess themselves guilty.

4. Persons taken with the *mainourre* are not bailable, because it is *furtum manifestum*. [13]

But that is intended of the thief himself; for if *A.* steal goods, and sells them to *B.* and *B.* is taken with them, *B.* is bailable.

5. Persons that being committed for felony break prison, are not to be bailed; for, 1. It carries a presumption of their guilt. 2. It is a superadded felony to the former, for which they stood committed.

6. Notorious thieves: and herein common fame, and other circumstances may be opposed against their bailing, unless they can shew reasonable evidence to prove their innocence. 16 *E. 4. 5. a. b.*

7. Persons impeached and approved by an approver, because it induceth a strong suspicion that they are guilty, because the accuser confesseth himself guilty before he can impeach others.

But this hath certain exceptions, 1. If the approver be dead. 2. If the approver hath waved his appeal. 3. If the person accused by the approver be of good fame.

8. Persons arrested for wilful burning of another man's house, which was a felony at common law.

9. Persons arrested for falsifying the king's coin.

10. Or for counterfeiting the king's great or privy seal.

11. He that is excommunicated by the ordinary, is not bailable, unless it be for a temporal cause; and then upon a prohibition granted, he may not only be bailed but delivered; or upon an appeal and a special writ *de cautione admittendæ*, if not obeyed by the ordinary, a special writ may issue for his enlargement.

12. Or if he be imprisoned for some open misdeed, as if *A.* dangerously wounds *B.* he may be imprisoned till it be known whether the party will die or live; and regularly is not to be bailed, till it shall probably appear that the danger is over. 10 *H.* 7. 20. *a.* 3. *H.* 7. *cap.* 1.

13. Nor he that is arrested for treason, that toucheth the king, whether he be indicted or not; these are neither bailable by virtue of the common writ *de homine replegiando*, nor *ex officio* by the sheriff or bailiff of a liberty.

But all or any of these are bailable by the court of king's bench. 2 *Co. Instit.* 189.

III. The third thing provided by this statute, is to declare who are bailable by the sheriff, and they are of seven kinds.

1. Persons indicted before the sheriff for larceny, if they have not been accused of other felonies before, or as the writ of the register, *f.* 83. *b.* 268. *b.* styles them, if they are of good fame.

This therefore lies very much in the discretion and true information of the sheriff, or other justices that commit them.

2. Persons imprisoned for a light suspicion, *dum tamen fuerint bonæ famæ.*

3. Persons indicted for petit larceny.

4. Persons accused for receiving of felons.

5. Or of commandment, force, or aid to the felony done.

These two last concern accessaries *after* and *before*, wherein there is some diversity of opinion in our [135] books.

Regularly in all cases of felony, tho it be murder, the accessory is bailable till the principal be attaind, and this holds as well in cases of the death of a man as other felonies, 40 *E.* 3. 42. *a.* 40 *Assiz.* 8. But if the principal be once attaind, and then the accessory is taken, he shall not be bailed until he hath pleaded to the indictment; but, after plea pleaded by him, he

shall be bailed, notwithstanding the attainder of the principal, tho it be in case of murder. 43 E. 3. 17. b. 50 E. 3. 15. a. 27 Assiz. 10. 47 Assiz. 16.

6. Or indicted or accused for an offense, for which he ought not to lose life or member, unless in cases of offenses against acts of parliament, where the acts of parliament exclude bail.

7. Or appeal'd by an approver, who is since dead.

These be the cases wherein by *that* act the party is bailable.

And therefore though a party be committed, and the tenor of the *mittimus* be to detain him without bail or mainprise, yet if the offense be by law bailable, he that hath the power of bailing may bail him. *Crompt. de Pace*, 153. a.

This statute adds a penalty, 1. For bailing a person not bailable; if he be a sheriff, constable, or bailiff of fee, he shall lose his office; and if he be an under-bailiff, or not a bailiff of fee, he shall have three years imprisonment, and be fined at the king's pleasure. 2. And if he shall detain persons replevisable after surety offered, he shall be grievously amerced.[14]

And thus far for the statute of 3 E. 1.

[136] CHAPTER XVI.

CONCERNING THE STATUTES OF 34 E. 3. 1 R. 3. 3 H. 7.

1 & 2 P. & M. 2 & 3. P. & M. IN RELATION TO BAILMENT OF PRISONERS.

ANTIENTLY most of the business touching bailment of prisoners for felony or misdemeanors was performed by the sheriff or special bailiffs of liberties, either by writ, or *virtute officii*.

But when the offices of justices of peace were instituted by the statute of 1 E. 3. they gradually had the greater business of committing and bailing offenders devolved into their hands; and by successive acts of parliament.

1. The power of the sheriff grew out of use.[1] 2. The jus-

[14] To refuse bail where the party ought to be bailed (the party offering the bail) is a misdemeanor punishable not only at the suit of the party, but also by indictment or criminal information. 2 Hawk. c. 15, § 13; *Osborn v. Gough*, 3 B. & P. 551; see *R. v. Badger*, Q. B. Hil. vac. 1843; *Evans v. Foster*, 1 N. Hampshire, 374.

[1] At this day the sheriff has no power to bail, or at least it is never exercised

tices of peace obtained most of the sheriff's power in relation to bailment. 3. Their power of bailment is in relation to offenses extended larger than the sheriff's, and in some kind larger than the limits prescribed by 3 *E.* 1. 4. Yet in some respects the sheriff's power as to bailing in offenses not capital was enlarged by the statute of 23 *H.* 6. *cap.* 10.

I shall therefore take these several statutes in order of time.

1. The statute of 34 *E.* 3. *cap.* 1. gave them power to apprehend malefactors, and to commit them to custody, or to bind them to their good behaviour, which was not intended perpetual, but in nature of bail, *viz.* to appear at such a day at their sessions, and in the mean time to be of good behaviour. [2]

in practice, upon criminal charges. 2 *H. Bl.* 418; 4 *Term. Reps.* 505; *Hawk. B.* 2 *ch.* 15, § 26, 27.

By the common law every constable, being a conservator of the peace, might have bailed one suspected of felony, but this authority is transferred from him to the justices of peace by several statutes. *Lamb.* 15.

[2] This *surety for good behaviour* is said to be of near affinity to *surety of the peace*. *Dalt. chap.* 173; *Lombard, book* 2. p. 115; 2 *Hawkins, chap.* 41.

Dr. Burn says that it does not appear that the conservators of the peace at common law had any power as touching *the good behaviour* further than as it had a relation to the peace, and not as it is contradistinguished from it.

These two powers of the magistrate, which Blackstone classes as the "means of preventing offences," and of which he says, that it is really an honor and almost a singular one to the English laws that they furnish such a title, are nevertheless powers in the exercise of which, more perhaps than of any others in the law, the liberty of the citizen is but vaguely defined and protected against the discretion of the magistrate.

Surety of the peace, which means of course imprisonment and indefinite imprisonment for those who cannot give it, may be required, says Dalton, by every justice of peace by virtue of his office and of his own power derived from his commission, and that either of his own motion and discretion or else at the request or prayer of another, *Dalt. chap.* 116; and see for the various charges upon which the party may be required to give such surety. The power of justices of the peace to require this surety is said by Lord Denman in *R. v. Dunn*, 4 *Per. & Dav.* 438, to be derived only from their commission; and see *Willis v. Bridger*, 2 *B. & Ald.* 286. All persons within the king's protection may have surety of the peace: a wife may have it against her husband or a husband against his wife. 1 *Hawk. chap.* 60. It may be granted for threats against the wife or child: *Dalt.* 266; but not against the servants or cattle of another. *Lamb.* 83. The recognizance shall be taken in the name of the king and the "justice of the peace may thereby bind the party to keep the peace for one year or for a longer time, (by his discretion) yea he may bind the party during his life upon reasonable cause: and this the justice may do either by his own absolute authority or upon complaint to him made and upon good cause showed; as if the offender be a common barterer, a rioter, or else in the justice's conscience a dangerous person." *Dalt.* 276. *chap.* 19. *Hawkins* recommends it to be the safest way to bind the party to appear at the next sessions and in the mean time to keep the peace. See 1 *Hawk. chap.* 60. §. 16; *Lombard, p.* 105. And such is the form of the recognizance as given in both Dalton and Lombard; the party is recognized to appear at the next sessions with surety for keeping the peace *ad interim*, see *Lamb. p.* 105; *Dalt. p.* 479. But in the case of *Willis v. Bridger*, 2 *B. & Ald.* 286, which was an action of trespass, where the warrant, upon which the plaintiff had been arrested and which required of him surety of the peace for the term of two

By the statute of 23 *H. 6. cap. 10.* there is not only power, but command to the sheriff to let out by sufficient sureties parties arrested in personal actions, and upon indictments of trespass, (except persons taken by *excommunicatio capiendo*, condem-

years, was alleged to be illegal, *C. J. Abbott* held "that a justice of the peace has by virtue of the first clause of assignavimus in his commission power to take surety of the peace for such time as he may think right, and not only to the next sessions." Held otherwise in *Massachusetts, Com. v. Ward*, 4 *Mass. Rep.* 497. In the case of *Rex v. Tregarthen*, 2 *Nes. & Men.* 379, the court of King's Bench refused to interfere with the discretion of a magistrate in taking sureties of the peace; and in the case of *Rex v. Holloway*, 2 *Dowl.* 595, which was a like application, *Teunton, J.* seems to say that they have not power to reduce this bail; *sed quare*; and see *R. v. Bowes*, 1 *T. R.* 700, where the court did interfere to reduce the time of such bail. And *per Asturst, J.* "it has been said that the court may require fresh bail at the end of a twelvemonth and so from year to year as long as they should think necessary, without any fresh facts being exhibited against the defendant. But I much doubt whether we have such a power. It has been admitted that there never was any instance of the kind; and I confess I should be very loth to establish such a precedent." In the case of *Rex v. Dunn*, 4 *Per. & Dav.* 437, where Miss Couts had prayed and got from a magistrate surety of the peace for her protection, Lord Denman held that "there must be threats of future harm in order to surety of the peace, no precedent had been found in the reports of articles of the peace which omit to state in terms that the exhibitant was threatened or the fact of such language being employed as the court could not fail to see conveyed a threat." And the prisoner was in that case discharged on habeas corpus for want of such proof appearing. By *stat. 21 Jac. 1. c. 8.* the court of Chancery and the court of King's Bench cannot grant surety of the peace upon the mere oath of the party as formerly, but only on the exhibition of *articles of the peace*.

Surety for good behaviour which justices of the peace are first given power to take by statute 34 *Edw. III. chap. 1*; 2 *Reeves' Hist. Eng. Law.* 473, is limited by Lord Coke under that statute to cases of persons "that be defamed and justly suspected that they intend to break the peace," and "which must concern the king's peace."

This statute, says Dr. Burn, seems to have had in view chiefly the disorders to which the country was then liable from great numbers of disbanded soldiers, who having served abroad in the wars of that victorious king (Edward III.) were grown strangers to industry and were rather inclined to live upon rapine and spoil. But whatever the natural and obvious sense of it may be when compared with the history and circumstances of those times, it is certain that it hath been carried much further by construction and the purport of it hath been extended by degrees, until at length there is scarcely any other statute which hath received such a largeness of interpretation. Dr. Burn then quotes the opinions of Lambard, Pulton, Dalton, Hawkins and others to show the various matters to which surety for good behaviour has been indefinitely extended, and concludes, that the magistrate upon the whole in this article of the good behaviour cannot exercise too much caution and good advisement, that in matters which the law hath left indefinite, it is better to fall short than exceed his commission and authority; that to bind a man to the good behaviour upon the statute for *evil fame* in general may not always be with safety: not only because upon an action brought it may be hard to prove such evil fame, but also because in fact it is not always true, for many a good man hath been evil spoken of; that although in some cases a justice of the peace may have a discretionary power (as Mr. Hawkins expresseth it) yet he must remember withal that it is a *legal* discretion in which in favour of liberty great tenderness is to be used, &c. See 5 *Burn*, 1220. *edit.* 1845.

The qualification in the text, that the surety under this statute to be taken by a

nation, judgment, execution, surety of the peace, or by commandment of the justices or persons taken upon the statute of labourers,) yet their power of bailing of felons, &c. by the statute of 3 E. 1. continued.

justice, "was not intended perpetual, but in nature of bail, viz. to appear such a day at their sessions and in the mean time to be of good behaviour," would seem to be supported by the form of recognizance given in *Lambard* and *Dalton*, "quod personaliter comparebit coram iudicialibus dict' dom' reg' ad pacem, &c. ad proximam generalem sessionem, &c. et quod ipse interim se bene geret erga dom' reg'." *Lamb.* 122. Indeed if there be an indefinite power of imprisonment upon suspicion not after conviction nor for trial, in either justices of the peace or the higher judges, to speak of none other what becomes of the provision of the great charter "nullus liber homo capiatur vel imprisonetur nisi per legale iudicium parium suorum." *C. J. Abbott* in the case of *Willis v. Bridger*, 2 B. & Ald. p. 286. observes upon this comment of Lord Hale upon the stat. 34 Edw. III. and considers that it was meant to be applied not to cases of surety of the peace but to cases of surety for good behaviour of persons who are charged with offences for which it is supposed they are to be brought to trial; that with regard to such persons, the surety or mainprize must necessarily be taken for appearance at some definite time and place, at which an indictment may be preferred or brought to trial against them; and it is proper that the surety should also extend to their good behaviour in the mean time.

In the case of *Mr. Selden*, 7 *Harg. State Trials*, 240, who with others had been long imprisoned, when the king at last agreed that they should be bailed until their trial, surety for good behaviour was also demanded of them ad interim. They offered the bail for their appearance but went again to jail rather than to give the surety for their good behaviour. It was contended in their behalf that the demand of this surety was a matter of discretion with the court and seldom urged upon returns of felonies or treasons; and one of them, *Mr. Long*, who had found sureties at the Chief Justice's chambers, refused to continue them any longer, inasmuch as they were bound in a great sum and the good behaviour was a ticklish point.

Surety for the good bearing may be forfeited more easily than surety of the peace, viz. "by the number of a man's company or by his or their weapons or harness," although there be no breach of the peace. *Lamb.* book 2 p. 115.

In *New York* security to keep the peace and security to be of good behaviour and the powers possessed by justices of the peace in requiring them are defined by statute, and no person may be committed to prison for not giving the same in any case except such as are prescribed or authorized by statute. 2 R. S. 705. § 14.

In *Virginia* the judges of the Court of Appeals and General Court, and the justices of the peace are empowered, the former throughout the commonwealth, and the latter within their several counties and corporations "to demand of such persons as are not of good fame sufficient surety and mainprize of their good behaviour." *R. C. chap.* 74. These words are to be construed according to the exposition they have received in the statute of 34 Edw. III. from which they are taken. *Davis' Crim. Law*, 384.

In *Pennsylvania* this power, to require surety before conviction for other than appearance, is said by *C. J. Tilghman*, in *Com. v. Duane*, 1 Binn. 98, n. to be founded upon the English statute 34 Edw. III. chap. 1; the right of "holding to bail for good behaviour" against libels, (to which *Dalton* extends it,) is doubted, or at least that the case should be accompanied with extraordinary circumstances to justify the requiring such surety: surety for good behaviour is said to be more extensive in its nature than surety for the peace, and may be more easily forfeited, and therefore should be exacted with greater caution.

March 12, 1847. In the criminal court at Philadelphia three young men

II. By the statute of 1 R. 3. *cap.* 3. "Forasmuch as persons have been taken and imprisoned upon suspicion of felony, sometimes upon light suspicions, sometimes by malice, and detained without bail or mainprise, it is enacted, that every justice of

were put upon their trial on a charge of riot in Moyamensing. After the witnesses for the Commonwealth had been heard, the prosecution was abandoned, and the jury asked to find a verdict of *acquittal*, as there was not testimony enough to convict them of the charge of riot. *Campbell, J.* presiding, ordered each of the defendants to enter bail in the sum of five hundred dollars for their future good behaviour, it being known to the court that they had been committing overt acts in the lower part of the township.

Respub. v. Donagan, 2 Yeates (Penn.) Heps. 437, was a case where after a trial of the defendants and *their acquittal by a jury*, the Court of Oyer and Terminer where the trial had been held, thinking from what had appeared on the trial that there was strong ground to believe the prisoners were guilty, ordered them to give bail in ten thousand dollars for their good behaviour during fourteen years, with two good sureties in ten thousand dollars each; in default of which they were committed. This demand of bail was, in the circumstances of the defendants, of course equivalent to imprisonment for life, or at least for fourteen years, supposing that would satisfy the requirement. It does not appear from the report of the case that there was any evidence of *evil feme* or of *future* evil intention, except as arising from the past offence, of which they had been suspected, indicted and acquitted by a jury, and were still suspected by the court. The case was removed by certiorari to the Supreme Court, and on application for their discharge, it was said *per curiam*: "The court before whom the trial was had, under their general authority to preserve the peace, had a right to require such bail and for such a length of time, as they judged would best answer the ends of public justice. No doubt can be entertained of it. And it would be highly improper for us to interfere in a matter wherein they have exercised their legal discretion." There is no authority cited by court or counsel; there is a reference at the foot of the page, apparently by the reporter or editor of the book, to *Comb. 40*, and 2 *Hawk. 442*, as authority "that *surety for good behaviour* may be ordered by the court *after acquittal*."

The case in *Comberbach* was an information against Sir John Knight for going armed to church contrary to the statute 2 *Edw. III.* The court say, *p. 38*, that conviction under this statute should depend on the *malice animi* or otherwise with which he went armed: he was acquitted; and after, on motion of the Attorney General, was ordered to give bail. This charge, in its nature, would seem to imply *future* danger to the peace; and from the report of the case it would appear, that though Sir John could not be convicted under the statute for want of *evil intention*, yet that he still went armed to church, and for the future safety of this he was probably held to surety of the peace.

Mr. Hawkins says: "That it hath been adjudged that if the jury acquit a prisoner of an indictment of felony against manifest evidence, the court may before the verdict is recorded, but not after, order them to go out again and reconsider the matter; but this is by many thought hard, and seems not of late years to have been so frequently practised as formerly. Also there are instances where defendants acquitted against plain evidence of felonies and other enormous crimes, have been bound to their good behaviour. However, it is settled," &c. 2 *Hawkins, 442, chap. 47, § 11*. Two cases are cited in the margin:

1. *Hopstill Tulden's case, Cro. Car. 291*. Where the defendant was indicted of buggery and acquitted: "but because the evidence (if it had been believed by the jury) was very strong against the prisoner, Richardson Chief Justice, and Jones appointed that the prisoner should be bound to his good behaviour; where-

peace within their limits have power to let such prisoners to bail, as if they had been indicted before them at their sessions, and shall have power to inquire of escapes."

This gave power to any one justice of peace to bail any prisoner for felony, and excepts not manslaughter, but withal supposeth, that before this act they could not bail till indictment in their sessions; but it seems was somewhat uncertain, for it was, *where they were committed for malice or light suspicions.*

III. The statute of 3 H. 7. cap. 3. recking the statute of 1 R. 3. and that by colour thereof divers persons not mainprenable

upon, against the opinion of myself (Croke, J.) and Justice Berkley, he was so bound."

2. *Evans and Cottingham's case, Ore. Car.* 506, who were indicted with seven others for a grand riot; four of them being arraigned were found guilty, and five of them were found *not guilty*; but against three of these there was probable evidence that they were aiding to this riot and *récours*, but the jury acquitted them; wherefore because it was so great a riot and offence, being committed so near the court, it was adjudged that the said four persons which were so convicted, should be committed to prison, and every of them should pay 500 pounds fine to the king, and that every of them should stand on the pillory at Westminster and Charing Cross, where the riot was done; and that Thomas Groom, who was a cobbler and entered into the house with a drawn sword and a kettle upon his head, as an helmet to defend himself, should stand upon the pillory with a sword in his hand and a kettle upon his head; and should be bound with good sureties for their good behaviour, before they should be delivered: and the three which were *acquitted*, against whom was such probable evidence, were bound to find sureties for their good behaviour.

In the *Queen v. Rogers, Holt*, 331, it is said by Holt, C. J.: "So in this court, if a witness will be insolent, we may commit for the immediate contempt or bind him to the good behaviour. But we cannot indict him for it, and that is the course according to the common law of England. And a binding to good behaviour is not by way of punishment, for it is to show that when one has broke the good behaviour, he is not to be any more trusted." Quoted 1 Siderfin, 144, which was a case of commitment for contempt.

In *Elizabeth Claxten's case, Mich.* 13 W. 3, Holt, C. J. committed the defendant, "because it appears that she is a lewd woman and a frequenter of bawdy houses; ideo, she is committed till she find sureties of good behaviour;" and he quoted 13 Hen. VII. 10: "That a constable may commit lewd women till they find sureties, and neighbours are bound to assist."

In the case of *R. v. Dunn*, 4 Per. & Dav. 437, the Attorney General, Sir J. Campbell, after the decision and opinion of the court, by which the prisoner was discharged from the articles of the peace, submitted that upon all the facts the court had then jurisdiction to require from the defendant *surety for his good behaviour*; but Lord Denman said, that the judgment of the court must be taken as disposing of the whole matter up to that time.

The United States' Act of 1798, sess. 2, chap. 83, provides, That the judges of the Supreme Court and of the several District Courts of the United States, and all judges and justices of the courts of the several States having authority by the laws of the United States to take cognizance of offences against the constitution and laws thereof, shall respectively have the like power and authority to hold to security of the peace and for good behaviour in cases arising under the constitution and laws of the United States, as may or can be lawfully exercised by any judge or justice of the peace of the respective States in cases cognizable before them.

were let to bail, enacts, "That two justices of the peace, whereof one of the *quorum*, have power to let such persons as are mainpernable by law, to bail to the next sessions of the peace or gaol-delivery, and shall accordingly return the recognizance under pain of 10*l*.

This statute seems, 1. To repeal the statute of 1 *R.* 3. as to bailing by one justice, and gives it to two justices, whereof one of the *quorum*. 2. It limits also the power of bailment only to such cases as are bailable by law; and therefore, it seems, takes in the statute of 3 *E.* 1. as the directory what persons are by law bailable. And thus it stood till 1 *Mar.*

IV. By the statute of 1 & 2 *P. & M. cap.* 13. these two things are principally enacted.

1. That whereas the statute of 3 *H.* 7. is general, that two justices shall let to bail such as are bailable by law, this statute in express words makes the statute of 3 *E.* 1. the standard for the taking of bail by two justices.

2. That any person arrested for manslaughter, or [138] other felony bailable by law, or suspicion thereof, shall not be bailed but by two justices of peace, whereof one of the *quorum*, both to be present at the bailing of such offender, and to certify it in writing at the next gaol-delivery; but the justices of peace and coroner in *London* (and the county of *Middlesex*, and in other cities, boroughs, and towns corporate within their several jurisdictions) to do as formerly: justices of peace, &c. offending contrary to the true intent of this act, the justices of gaol-delivery may fine them.

V. The statute of 2 & 3 *P. & M. cap.* 10. only provides for examinations and informations to be taken by the justices of peace, as well upon commitment as bailing of any prisoner for manslaughter, or other felony.[3]

[3] These statutes, as to the bailing of prisoners were repealed by 7 *Geo.* IV. ch. 64, § 1, and now by that act "where any person shall be taken on a charge of felony or suspicion of felony, before one or more justice or justices of the peace, and the charge shall be supported by positive and credible evidence of the fact or by such evidence as if not explained or contradicted, shall in the opinion of the justice or justices raise a strong presumption of the guilt of the person charged, such person shall be committed to prison by such justice or justices in the manner hereinafter mentioned. But if there be only one justice present, and the whole evidence given before him shall be such as neither to raise a strong presumption of guilt, nor to warrant the dismissal of the charge, such justice shall order the person charged to be detained in custody until he or she shall be taken before two justices at the least, (and when any person so taken, or any person in the first instance taken, before two justices of the peace shall be charged with felony, or on suspicion of felony, and the evidence given in support of the charge shall in their opinion not be such as to raise a strong presumption of the guilt of the person charged, and to require his or her commitment; or such evidence shall be adduced on behalf the person charged as shall in their

Upon these statutes, and that of 3 *E.* 1. which expressly saith, "That for the death of a man(*) a person is not bailable by law," it hath been questioned, whether justices of peace may bail in case of manslaughter.

On the one side, the statutes of 2 *Mar.* and 3 *Mar.* expressly admit that they may, and accordingly the usual practice hath been: *vide Lamb. Justice, p. 25. & sequentibus.*

On the other side, these things make against their bailing, *viz.* 1. The statute of *Westm.* 1. [3 *E.* 1.] *cap.* 15. recites expressly, that for the death of a man the offender is not by law bailable, and the very statute of 1 & 2 *P. & M.* refers to the statute of 3 *E.* 1. as the rule and standard for justices of peace to proceed by, in case of bailing.

2. Again, the statute of *Gloucester, cap.* 9.(†) expressly provides, "That he that kills a man by misadventure, shall remain in prison till the coming of the justices in *eyre* or gaol-delivery, and then he shall be tried;" and if in case of a death by *infortunium*, much more in case of a simple manslaughter.

(*) *Vide Glanvil, Lib. xiv. cap. 1 & 3.*

(†) 2 *Co. Instit. p.* 313.

opinion weaken the presumption of his or her guilt; but there shall notwithstanding appear to them in either of such cases to be sufficient ground for judicial inquiry into his or her guilt, the person charged shall be admitted to bail by such two justices in the manner hereinafter mentioned.) Provided always, that nothing herein contained, shall be construed to require any such justice or justices to hear evidence on behalf of any person so charged as aforesaid, unless it shall appear to him or them to be meet and conducive to the ends of justice to hear the same."

This enactment, as to the cases in which justices should bail, has undergone an important amendment by the statute 5 & 6 *Will. IV. c.* 33, § 33, which, after reciting "Whereas in many cases the taking bail for the appearance of persons charged with felony may be safely admitted without endangering the appearance of such persons to take their trial in due course of law and it is therefore expedient in such cases to amend and extend the provisions in that respect of the 7 *Geo. IV. c.* 64," enacts "that it shall be lawful for any two justices of the peace, if they shall think fit (of whom one or other shall have signed the warrant of commitment) to admit any person or persons charged with felony, or against whom a warrant of commitment for felony is signed, to bail, in the manner and according to the provisions directed by the said recited act, in such sum or sums of money and with such surety or sureties as they shall think fit, and notwithstanding such person or persons shall have confessed the matter laid to his or their charge, or notwithstanding such justices shall not think that such charge is groundless, or shall think that the circumstances are such as to raise a presumption of guilt."

Since these enactments one justice cannot admit to bail on a charge of felony or suspicion of felony. He must either dismiss the charge or commit the accused, or he must order the party to be detained until he be taken before two justices. If the prisoner be brought before two or more justices either in the first instance or on being ordered to be detained by a single justice or after a warrant of commitment made, they may, if they shall think fit, admit him to bail. 1 *Burn, 321.*

3. The writ of *homine replegiando* excepts the case of the death of a man from bail.

4. It was resolved by all the judges of *England*, 7 *Car.* 1. that a man is not bailable for manslaughter, as I had it from the book of the late chief justice *Hynde*, who accordingly [139] did set a fine of 20*l.* upon a learned reader, being a justice of peace, and now an antient serjeant at law for bailing a man in case of manslaughter in the county of *Salop*, which I knew to be true; and this was approved by most of the judges that heard it.

To settle this business therefore I say,

1. That in case of murder it is of all hands agreed, that the justices of peace cannot bail, but it is to be done regularly only in the king's bench.

2. That in case of manslaughter, if the fact be apparent by plain proof or confession that a man is kild, and kild by *J. S.* whether the same were done *ex malitiâ præcogitatâ*, or upon a sudden falling out, or but *se defendendo*, yet a justice of peace; or two justices, whereof one of the *quorum* cannot bail by any law in force.

3. That whether it do *constare de personâ occidentis*, or *de modo occidendi*, or not, yet if the party be indicted of manslaughter, nay tho it were but *se defendendo*, the justices of peace cannot bail.

4. But if there be a manslaughter committed, and it is certainly no more, and a party suspected is brought before two justices of the peace, whereof one is of the *quorum*, if the matter be doubtful and uncertain, whether this be the person that did the fact, the two justices of peace, whereof one is of the *quorum*, may bail *that* man, and that by virtue of the statute of 1 *R.* 3. *cap.* 3. which gave power to one justice of peace generally to bail any person suspect of felony, if it appear to him to be a light suspicion, (whereof he must needs be the judge,) which doubtless extended to manslaughter; and altho the statute of 3 *H.* 7. *cap.* 3. transfers that power to two justices of peace, whereof one of the *quorum*, yet still it was bottomed upon the statute of 1 *R.* 3. and the statute of 1 & 2 *P. & M.* is bottomed upon that of 3 *H.* 7.

Again, the statute even of *Westminster* 1. [*viz.* 3 *E.* 1.] tho it say *de morte hominis*, there is no bail at common law, yet it must be intended, when the offender is certainly known, for it generally provides, that persons taken upon a light suspicion shall be baid; and therefore the statute of 1 & 2 [140] *P. & M.* when it makes the statute of *Westminster* 1. the standard of their proceeding in point of bailment, and yet supposeth one taken for manslaughter bailable, must

mean such a manslaughter, where the party is [only] suspected, not where the thing is done [by him]; for the words *bailable by law*, do not only refer to *felony*, which is the last antecedent, but *manslaughter*: and by this construction, all the statutes, and all parts of the statutes stand together.[4]

[4] *The Statute 31 Charles II. chap. 2d entitled "An act for the better securing the liberty of the subject and for prevention of imprisonment beyond the seas," provides, "Whereas great delays have been used by sheriffs, gaolers and other officers to whose custody any of the king's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of habeas corpus to them directed, by standing out an alias and pluries habeas corpus and sometimes more and by other shifts to avoid their yielding obedience to such writs, contrary to their duty and the known law of the land whereby many of the king's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable to their great charges and vexation:*

II. For the prevention whereof and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters; Be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords temporal and spiritual and commons in this present parliament assembled and by the authority thereof, That whosoever any person or persons shall bring any habeas corpus directed unto any sheriff or sheriffs, gaoler, minister or other person whatsoever, for any person in his or their custody, and the said writ shall be served upon the said officer or left at the gaol or prison with any of the under officers, under keepers or deputy of the said officers or keepers, that the said officer or officers, his or their under officers, under keepers or deputies, shall within three days after the service thereof as aforesaid (unless the commitment aforesaid were for treason or felony plainly and specially expressed in the warrant of commitment) upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the judge or court that awarded the same and endorsed upon the said writ, not exceeding twelve pence per mile, and upon security given by his own bond to pay the charges of carrying back the prisoner, if he shall be remanded by the court or judge to which he shall be brought according to the true intent and meaning of this present act and that he will not make any escape by the way, make return of such writ and bring or cause to be brought the body of the party so committed or restrained unto or before the lord chancellor or lord keeper of the great seal of England for the time or the judges or barons of the said court from whence the said writ shall issue or unto or before such other person or persons before whom the said writ is made returnable according to the command thereof and shall then likewise certify the true causes of his detainer or imprisonment, unless the commitment of the said party be in any place beyond the distance of twenty miles from the place or places where such court or person is or shall be residing; and if beyond the distance of twenty miles and not above one hundred miles then within the space of ten days, and if beyond the distance of one hundred miles then within the space of twenty days after such delivery aforesaid and not longer.

III. And to the intent that no sheriff, gaoler or other officer may pretend ignorance of the import of any such writ: Be it enacted by the authority aforesaid, that all such writs shall be marked in this manner, per statutum tricesimo primo Caroli secundi regis and shall be signed by the person that awards the same; and if any person or persons shall be or stand committed or detained as aforesaid for any crime, unless for treason or felony plainly expressed in the warrant of commitment, in the vacation time and out of term it shall and may be lawful to and for the person or persons so committed or detained (other than persons convicted or in execution by legal process) or any one on his or their behalf to appeal or complain to the lord chancellor or lord keeper or any one of his majesty's jus-

tices either of the one bench or of the other or the barons of the exchequer of the degree of the coif; and the said lord chancellor, lord keeper, justices or barons or any of them upon view of the copy or copies of the warrant or warrants of commitment and detainer or otherwise upon oath made that such copy or copies were denied to be given by such person or persons in whose custody the prisoner or prisoners is or are detained are hereby authorized and required on request made in writing by such person or persons or any on his, her or their behalf attested and subscribed by two witnesses who were present at the delivery of the same to award and grant an *habeas corpus* under the seal of such court whereof he shall then be one of the judges, to be directed to the officer or officers in whose custody the party so committed and detained shall be, returnable immediate before the said lord chancellor or lord keeper or such justice, baron or any other justice or baron of the degree of the coif of any of the said courts; and upon service thereof as aforesaid, the officer or officers, under keeper or under keepers or their deputy in whose custody the party is so committed or detained, shall within the times respectively before limited bring such prisoners before the said lord chancellor or lord keeper or such justices, barons or one of them before whom the said writ is made returnable and in case of his absence before any other of them with the return of such writ and the true causes of the commitment and detainer and thereupon within two days after the party shall be brought before them, the said lord chancellor or lord keeper or such justice or baron before whom the prisoner shall be brought as aforesaid shall discharge the said prisoner from his imprisonment, taking his or their recognizance with one or more surety or sureties in any sum according to their discretions, having regard to the quality of the person and nature of the offence, for his or their appearance in the court of king's bench the term following or at the next assizes, sessions or general gaol-delivery of and for such county, city or place where the commitment was or where the offence was committed or in such other court where the said offence is properly cognizable as the case shall require and there shall certify the said writ with the return thereof and the said recognizance or recognizances into the said court, where such appearance is to be made, unless it shall appear unto the said lord chancellor or lord keeper or justice or justices or baron or barons that the party so committed is detained upon a legal process, order or warrant out of some court that hath jurisdiction of criminal matters or by some warrant signed and sealed with the hand and seal of any of the said justices or barons or some justice or justices of the peace for such matters or offences for the which by the law the prisoner is not bailable.

IV. Provided always and be it enacted, that if any person shall have wilfully neglected by the space of two whole terms after his imprisonment to pray a *habeas corpus* for his enlargement, such person so wilfully neglecting shall not have any *habeas corpus* to be granted in vacation time in pursuance of this act.

V. And be it further enacted by the authority aforesaid that if any officer or officers, his or their under officer or under officers, under keeper or under keepers or deputy shall neglect or refuse to make the returns aforesaid or to bring the body or bodies of the prisoner or prisoners according to the command of the said writ within the respective times aforesaid or upon demand made by the prisoner or person in his behalf, shall refuse to deliver or within the space of six hours after demand shall not deliver to the person so demanding a true copy of the warrant, or warrants of commitment and detainer of such prisoner, which he and they are hereby required to deliver accordingly, all and every the head gaolers and keepers of such prisons and such other person in whose custody the prisoner shall be detained shall for the first offence forfeit to the prisoner or party grieved the sum of one hundred pounds and for the second offence the sum of two hundred pounds and shall and is hereby made incapable to hold or execute his said office; the said penalties to be recovered by the prisoner or party grieved, his executors or administrators by any action of debt, suit, bill, plaint or information in any of the king's courts at Westminster, wherein no essoin, protection, privilege, inspection, wager of law or stay of prosecution by non vult ulterius prosequi or otherwise shall be admitted or allowed or any more than one imparlance, and

any recovery or judgment at the suit of any party grieved shall be a sufficient conviction for the first offence, and any after recovery or judgment at the suit of a party grieved for any offence after the first judgment shall be a sufficient conviction to bring the officers or person within the said penalty for the second offence.

VI. And for the prevention of unjust vexation, by reiterated commitments for the same offence, be it enacted by the authority aforesaid, that no person or persons which shall be delivered or set at large upon any *habeas corpus* shall at any time hereafter be again imprisoned or committed for the same offence by any person or persons whatsoever other than by the legal order and process of such court wherein he or they shall be bound by recognizance to appear or other court having jurisdiction of the cause; and if any other person or persons shall knowingly contrary to this act recommit or imprison or knowingly procure or cause to be recommitting or imprisoned for the same offence or pretended offence any person or persons delivered or set at large as aforesaid or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved the sum of five hundred pounds, any colourable pretence or variation in the warrant or warrants of commitment notwithstanding, to be recovered as aforesaid.

VII. Provided always and be it further enacted, That if any person or persons shall be committed for high treason or felony plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court the first week of the term, or first day of the sessions of oyer and terminer and general gaol delivery, to be brought to his trial, shall not be indicted some time in the next term, sessions of oyer and terminer or general gaol delivery after such commitment, it shall and may be lawful to and for the judges of the Court of King's Bench or justices of oyer and terminer or general gaol delivery, and they are hereby required upon motion to them made in open court the last day of the term, sessions or gaol delivery, either by the prisoner or any one in his behalf, to set at liberty the prisoner upon bail unless it appear to the judges and justices upon oath made that the witnesses for the king could not be produced the same term, sessions or general gaol delivery; and if any person or persons committed as aforesaid upon his prayer or petition in open court, the first week of the term or first day of the sessions of oyer and terminer and general gaol delivery to be brought to his trial, shall not be indicted and tried the second term, sessions of oyer and terminer or general gaol delivery after his commitment or upon his trial shall be acquitted, he shall be discharged from his imprisonment.

VIII. Provided always that nothing in this act shall extend to discharge out of prison any person charged in debt or other action, or with process in any civil cause, but that after he shall be discharged of his imprisonment for such his criminal offence, he shall be kept in custody according to the law for such other suit.

IX. Provided always and be it enacted by the authority aforesaid, That if any person or persons, subjects of this realm, shall be committed to any prison or in custody of any officer or officers whatsoever for any criminal or supposed criminal matter, that the said person shall not be removed from the said prison and custody into the custody of any other officer or officers, unless it be by *habeas corpus* or some other legal writ, or where the prisoner is delivered to the constable or other inferior officer to carry to some common gaol, or where any person is sent by order of any judge of assize, or justice of the peace to any common work-house or house of correction, or where the prisoner is removed from one prison or place to another within the same county in order to his or her trial or discharge in due course of law, or in case of sudden fire or infection or other necessity; and if any person or persons shall after such commitment aforesaid make out and sign or countersign any warrants for such removal aforesaid contrary to this act, as well he that makes or signs or countersigns such warrant or warrants as the officer or officers that obey or execute the same, shall suffer and incur the pains and forfeitures in this act before mentioned, both for the first and second offence respectively, to be recovered in manner aforesaid by the party grieved.

X. Provided also, and be it further enacted by the authority aforesaid, That it shall and may be lawful to and for any prisoner and prisoners as aforesaid to move and obtain his or their *habeas corpus* as well out of the High Court of Chancery or Court of Exchequer as out of the Court of King's Bench or Common Pleas or either of them, and if the said Lord Chancellor or Lord Keeper, or any judge or judges, baron or barons for the time being of the degree of the Coif of any of the courts aforesaid in the vacation time upon view of the copy or copies of the warrant or warrants of commitment or detainer, or upon oath made that such copy or copies were denied as aforesaid, shall deny any writ of *habeas corpus* by this act required to be granted, being moved for as aforesaid, they shall severally forfeit to the prisoner or party grieved the sum of five hundred pounds, to be recovered in manner aforesaid.

XI. And be it declared and enacted by the authority aforesaid, That an *habeas corpus* according to the true intent and meaning of this act may be directed and run into any county palatine, the cinque ports or other privileged places within the kingdom of England, dominion of Wales or town of Berwick upon Tweed, and the islands of Jersey and Guernsey, any law or usage to the contrary notwithstanding.

XII. And for preventing illegal imprisonments in prisons beyond the seas, be it further enacted by the authority aforesaid, That no subject of this realm that now is or hereafter shall be an inhabitant or resident of this kingdom of England, dominion of Wales or town of Berwick upon Tweed shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his majesty his heirs or successors, and that every such imprisonment is hereby enacted and adjudged to be illegal, and that if any of the said subjects now is or hereafter shall be so imprisoned, every such person and persons so imprisoned shall and may for every such imprisonment maintain by virtue of this act an action or actions of false imprisonment in any of his majesty's courts of record against the person or persons by whom he or she shall be so committed, detained, imprisoned, sent prisoner or transported contrary to the true meaning of this act and against all or any person or persons that shall frame, contrive, write, seal or countersign any warrant or writing for such commitment, detainer, imprisonment or transportation or shall be advising, aiding or assisting in the same or any of them, and the plaintiff in every such action shall have judgment to recover his treble costs, besides damages, which damages so to be given shall not be less than five hundred pounds, in which action no delay, stay or stop of proceeding by rule, order or command, nor no injunction, protection or privilege whatsoever nor any more than one imparlance shall be allowed, except in such rule of the court wherein the action shall depend made in open court as shall be thought in justice necessary for special cause to be expressed in the said rule; and the person or persons who shall knowingly frame, contrive, write, seal or countersign any warrant for such commitment, detainer or transportation or shall so commit, detain, imprison or transport any person or persons contrary to this act or be any ways advising, aiding or assisting therein being lawfully convicted thereof shall be disabled from thenceforth to bear any office of trust or profit within the said realm of England, dominion of Wales or town of Berwick upon Tweed or any of the islands, territories or dominions thereunto belonging, and shall incur and sustain the pains, penalties and forfeitures limited, ordained and provided in and by the statute of provision and premunire made in the sixteenth year of king Richard the Second and be incapable of any pardon from the king, his heirs or successors of the said forfeitures, losses or disabilities of any of them.

XIII. Provided always that nothing in this act shall extend to give benefit to any person who shall by contract in writing agree with any merchant or owner of any plantation or other person whatsoever to be transported to any parts beyond the seas and receive earnest upon such agreement although that afterwards such person shall renounce such contract.

XIV. Provided always and be it enacted that if any person or persons lawfully

convicted of any felony shall in open court pray to be transported beyond the seas and the court shall think fit to leave him or them in prison for that purpose, such person or persons may be transported into any parts beyond the seas, this act or any thing therein contained to the contrary notwithstanding.

XV. Provided also and be it enacted that nothing herein contained shall be deemed, construed or taken to extend to the imprisonment of any person before the first day of June one thousand six hundred seventy-nine or to any thing advised, procured or otherwise done relating to such imprisonment, any thing herein contained to the contrary notwithstanding.

XVI. Provided, also that if any person or persons at any time resident in this realm shall have committed any capital offence in Scotland or Ireland or any of the islands or foreign plantations of the king his heirs or successors where he or she ought to be tried for such offence, such person or persons may be sent to such place there to receive such trial in such manner as the same might have been used before the making of this act, any thing herein contained to the contrary notwithstanding.

XVII. Provided also and be it enacted that no person or persons shall be sued, impleaded, molested or troubled for any offence against this act unless the party offending be sued or impleaded for the same within two years at the most after such time wherein the offence shall be committed in case the party grieved shall not be then in prison, and if he shall be in prison then within the space of two years after the decease of the person, imprisoned or his or her delivery out of prison, which shall first happen.

XVIII. And to the intent no person may avoid his trial at the assizes or general goal-delivery by procuring his removal before the assizes at such time as he cannot be brought back to receive his trial there, be it enacted that after the assizes proclaimed for that county where the prisoner is detained no person shall be removed from the common gaol upon any *habeas corpus* granted in pursuance of this act but upon any such *habeas corpus* shall be brought before the judge of assize in open court who is thereupon to do what to justice shall appertain.

XIX. Provided nevertheless that after the assizes are ended any person or persons detained may have his or her *habeas corpus* according to the direction and intention of this act.

XX. And be it also enacted by the authority aforesaid, that if any information, suit or action shall be brought or exhibited against any person or persons for any offence committed or to be committed against the form of this law it shall be lawful for such defendants to plead the general issue, that they are not guilty or that they owe nothing and to give such special matter in evidence to the jury that shall try the same which matter being pleaded had been good and sufficient matter in law to have discharged the said defendant or defendants against the said information, suit or action and the said matter shall be then as available to him or them to all intents and purposes as if he or they had sufficiently pleaded, set forth or alleged the same matter in bar or discharge of such information, suit or action.

XXI. And because many times persons charged with petty treason or felony or as accessories thereunto are committed upon suspicion only whereupon they are bailable or not according as the circumstances making out the suspicion are more or less weighty which are best known to the justices of peace that committed the persons and have the examinations before them or to other justices of the peace in the county, be it therefore enacted that when any person shall appear to be committed by any judge or justice of the peace and charged as accessory before the fact to any petty treason or felony or upon suspicion thereof with suspicion of petty treason or felony, which petty treason or felony shall be plainly and specially expressed in the warrant of commitment that such person shall not be removed or bailed by virtue of this act or in any other manner than they might have been before the making of this act.

The statute 56 Geo. III. ch. 100, enacts:

Sec. 1. That where any persons shall be confined or restrained of his or her

liberty (otherwise than for some criminal or supposed criminal matter and except persons imprisoned for debt or by process in any civil suit) within that part of Great Britain called England, dominion of Wales or town of Berwick upon Tweed or the isles of Jersey, Guernsey or Man, it shall and may be lawful for any one of the barons of the Exchequer of the degree of the coif as well as for any one of the justices of one bench or the other in Ireland and they are hereby required upon complaint made to them by or on the behalf of the person so confined or restrained if it shall appear by affidavit or affirmation (in cases where by law an affirmation is allowed) that there is probable and reasonable ground for such complaint to award in vacation time a writ of *habeas corpus ad subficiendum* under the seal of such court whereof he or they shall then be judges or one of the judges to be directed to the person or persons in whose custody or power the party so confined or restrained shall be returnable immediately before the person so awarding the same or before any other judge of the Court under the seal of which the said writ issued.

Sect. 2. If the person or persons to whom any writ of *habeas corpus* shall be directed, according to the provisions of this act upon service of such writ either by the actual delivery thereof to him her or them or by leaving the same at the place where the party shall be confined or restrained with any servant or agent of the person or persons so confining or restraining shall wilfully neglect or refuse to make a return or pay obedience thereto he she or they shall be deemed guilty of a contempt of the court under the seal whereof such writ shall have issued, and it shall be lawful to and for the said justice or baron before whom such writ shall be returnable upon proof made by affidavit of wilful disobedience of the said writ to issue a warrant under his hand and seal for the apprehending and bringing before him or before some other justice or baron of the same court the person or persons so wilfully disobeying the said writ in order to his her or their being bound to the king's majesty with two sufficient sureties in such sum as in the warrant shall be expressed with condition to appear in the court of which the said justice or baron is a judge at a day in the ensuing term to be mentioned in the said warrant to answer the matter of contempt with which he she or they are charged, and in case of neglect or refusal to become bound as aforesaid it shall be lawful for such justice or baron to commit such person or persons so neglecting or refusing to the jail or prison of the court of which such justice or baron shall be a judge there to remain until he she or they shall have become bound as aforesaid or shall be discharged by order of the court in term time, or by order of one of the justices or barons of the court in vacation and the recognizance or recognizances to be taken thereupon shall be returned and filed in the same court and shall continue in force until the matter of such contempt shall have been heard and determined unless sooner ordered by the court to be discharged, provided, that if such writ shall be awarded so late in the vacation by any one of the said justices or barons that in his opinion obedience thereto cannot be conveniently paid during such vacation the same shall and may at his discretion be made returnable in the court of which the said justice or baron shall be a justice or baron at a day certain in the next term, and the said court shall and may proceed thereupon and award process of contempt in case of disobedience thereto in like manner as upon disobedience to any writ originally awarded by the said court, provided also that if such writ shall be awarded by the court of King's Bench or the court of Common Pleas or court of Exchequer in the said countries respectively which last mentioned court shall have like power to award such writs as the respective courts of King's Bench and Common Pleas in each of the said countries now have in term but so late that in the judgment of the court obedience thereto cannot be conveniently paid during such term, the same shall and may at the discretion of the said court be made returnable at a day certain in the then next vacation before any justice or baron of the degree of the coif or if in Ireland before any justice or baron of the same court who shall and may proceed thereupon in such manner as by this act is directed concerning writs issuing in and made returnable during the vacation.

Sect. 3. That in all cases provided for by this act although the return to any

writ of habeas corpus shall be good and sufficient in law, it shall be lawful for the justice or baron before whom such writ may be returnable to proceed to examine into the truth of the facts set forth in such return by affidavit or by affirmation (in cases where affirmation is allowed by law) and to do therein as to justice shall appertain; and if such writ shall be returned before any one of the said justices or barons and it shall appear doubtful to him on such examination whether the material facts set forth in the said return or any of them be true or not, in such case it shall and may be lawful for the said justice or baron to let to bail the said person so confined or restrained upon his or her entering into a recognizance with one or more sureties or in case of infancy or coverture or other disability upon security by recognizance in a reasonable sum to appear in the court of which the said justice or baron shall be a justice or baron, upon a day certain in the terms following, and so from day to day as the court shall require, and to abide such order as the court shall make in and concerning the premises; and such justice or baron shall transmit into the same court the said writ and return together with such recognizance, affidavits and affirmations; and thereupon it shall be lawful for the said court to proceed to examine into the truth of the facts set forth in the return in a summary way by affidavit or affirmation (in cases where by law affirmation is allowed) and to order and determine touching the discharging, bailing or remanding the party.

Sect. 4. That the like proceedings may be had in the court for controverting the truth of the return to any such writ of habeas corpus awarded as aforesaid, although such writ shall be awarded by the said court itself or be returnable therein.

Sect. 5. That a writ of habeas corpus according to the true intent and meaning of this act may be directed and run into any county palatine or cinque port or any other privileged place within that part of Great Britain called England, dominion of Wales and town of Berwick upon Tweed and the isles of Jersey, Guernsey and Man respectively; and also into any port, harbour road creek or bay upon the coast of England or Wales although the same should lie out of the body of any county; and if such writ shall issue in Ireland the same may be directed and run into any port harbour road creek or bay although the same should not be in the body of any county, any law or usage to the contrary in any wise notwithstanding.

Sect. 6. The several provisions made in this act touching the making writs of *habeas corpus* issuing in time of vacation returnable into the said courts or for making such writs awarded in term time returnable in vacation as the cases may respectively happen, and also for making wilful disobedience thereto a contempt of the court and for issuing warrants to apprehend and bring before the said justices or barons or any of them any person or persons wilfully disobeying any such writ and in case of neglect or refusal to become bound as aforesaid for committing the person or persons so neglecting or refusing to gaol as aforesaid respecting the recognizances to be taken as aforesaid and the proceeding or proceedings thereon shall extend to all writs of *habeas corpus* awarded in pursuance of the said act passed in England in the thirty-first year of the reign of king Charles the Second or of the said act passed in Ireland in the twenty-first and twenty-second years of his present majesty and hereinbefore recited in as ample and beneficial a manner as if such writs and the said cases arising thereon had been hereinbefore specially named and provided for respectively.

CHAPTER XVII.

CONCERNING THE FOURTH GENERAL, NAMELY, THE VARIOUS MANNER OF BAILING PRISONERS.

THE fourth thing comes to be considered, namely, the different manner of bailing of malefactors.

And this is of two kinds.

First, By writ.

Secondly, *Ex officio* without a writ.

[141] And, *first*, concerning bail by writ.

And these are of four kinds. 1. *Homine replegiando*. 2. *Breve de manucaptione*. 3. *Habeas corpus*. 4. *De odio & atia*.

I. The writ of *homine replegiando* lies for any person imprisoned for a misdemeanor, wherein by the law he is bailable; and therefore in the writ there is an exception of the death of a man, persons imprisoned by the command of the king or his justices, or for offenses of the forest, *vel pro aliquo alio recto, quare secundum consuetudinem Angliæ non sit replegiabilis*. *F. N. B.* 66. f.

But the offenses in the forest are excepted, yet a special writ of *homine replegiando* lies for one taken by the ministers of the forest (*nota*, not by the chief justice) *F. N. B.* 67. a.

So that this writ as to the point of bailing is founded upon the statute of *Westm.* 1. cap. 15. or at least governed by it, only in the statute there the exception is of persons taken by [command of] *the Justices*, here it is *capitalis justiciarii*.

By this writ the sheriff is to deliver the party by mainprise; and if he returns, that *J. S.* makes title to the person imprisoned, either as his villain or ward, &c. he is to take sureties of the party imprisoned to appear in the king's bench or common-pleas, and to take bail of him for his appearance at the day, and to attach *J. S.* to appear at the same day, &c. where the business may be determined; and if *J. S.* be returned *non est inventus*, then a *capias in withernam* may be granted against him to take his body, and if a *non est inventus* be returned, a *withernam* to take his goods.

II. The writ of mainprise, and that is of two kinds, namely, 1. The general original writ *de manucaptione*. 2. Special writs of mainprise, both issuing out of the *Chancery*.

1. The general writs of mainprise are at large set down in the *Regist. f.* 268. & seq. and *F. N. B.* 250. & sequentibus, and

these writs seem to be grounded or directed also by the statute of 3 E. 1. cap. 15. for *that* is the rule and direction whereby persons are to be bailed by this general writ; for no persons criminal are bailable by this common writ of mainprise, for as such they are bailable by that statute; and this common writ of mainprise, respects either such as are committed by the sheriff or bailiff of a hundred, or such as, tho they are in the sheriff's custody, are yet committed to his custody by others, as justices of the peace, &c.

1. As to those of the former kind, we must call to remembrance what hath been before said touching the power of the sheriff to take indictments of felony, either by commission or in his *Turn*.

The former power is repealed by the statute of 28 E. 3. cap. 9. As to the latter, though the power of taking indictments continues in the sheriff's *Turn*, yet by the statute of 1 E. 4. cap. 2. they are to send them to the justices of peace to be determined in their sessions; but the sheriff nor his bailiffs are not to arrest or attach any person thereupon; and the like law is for bailiffs of hundreds, who have a leet of the hundred or *Turn* accompanying it.

And therefore as to these, the writ of mainprise is consequently taken away, according to my lord Coke, in his comment *super Westm.* 1 cap. 15. 2 *Instit.* p. 190.

But whereas it is there said, that *by that statute the writ of mainprise generally is taken away*, it is certainly mistaken; for the writ of mainprise hath still in cases of persons committed by the justices of peace, and some other cases, as shall be farther shewn.

2. The *second* sort therefore of these common writs of mainprise, were for such malefactors as were committed by others, if they were such as by the statute of *Westm.* 1. cap. 15, were bailable, and the writ of mainprise in this case continues in force and use to this day; as for instance, *F. N. B.* 250. *d.* for a person approved by an approver, if the approver is since dead; yet such a person can neither be taken by warrant of the sheriff or justice of peace, but by the coroner or justices of gaol-delivery.

F. N. B. 250. *g.* 251. *c.* for one indicted before the justices of peace for a trespass, 250. *i.* for forestalling, 250. *e.* as accessory to a felony, where the principal is not attaind.

Again, *F. N. B.* 250. *f.* for one taken by the king's commission for felony.

And this is that writ that seems intended by the book of 14 H. 6. 8. *a.* where it is said, "That he that is taken [143] by suggestion, as by justices of peace, &c. may be

bailed without a writ; but he that is taken by a writ, must be bailed by writ;”(*) which seems intended of this writ of mainprize; and tho the saying be not universally true at this day, for some that are taken by process or writ may, at least at this day, be bailed *virtute officii*; especially upon the statute of 23 H. 6. cap. 10. & Westm. 1. cap. 15. yet it sufficiently intimates, that the writ of mainprize was not taken away by 28 E. 3. cap. 9.

And thus far for the general writs of mainprize.

2. Special writs of mainprize were sometimes granted upon special occasions for those; that were not bailable otherwise.

Thus it was usual in antient times by the king's special warrant, sometimes by special commission, sometimes by immediate writ out of *chancery* in times of war, to deliver persons in prison for felony upon mainprize to go into foreign parts in the king's wars, as *Gascoigne*, and elsewhere, at the king's wages, & *stabunt recto in curia*, after their return, *si quis versus eos loqui voluerit*, and upon the return of such manucaptions into the *chancery* to have charters of Pardon. See precedents of such commissions and writs, *Pat. 22. E. 1. m. 1.* to *Roger Brabazon*, and *William Brereford*, *Rot. Vascun. 22 E. 1. m. 8. n^o. 11. & m. 12. n^o. 4.* for malefactors imprisond in all the gaols in *England* for felony and other crimes *per manucaptionem deliberand*; and the like was often practised upon like occasions in the reigns of other kings.

And thus far for writs of mainprize.

III. The third usual writ for bailing of criminals; is by *habeas corpus*, and this is a writ of a high nature; for if persons be wrongfully committed, they are to be discharged upon this writ returned; or if bailable, they are to be bailed; if not bailable, they are to be committed.

This writ issues out of the great courts of *Westminster*, but hath different uses and effects.

1. It may issue out of the court of *Common-pleas* or [144] *Exchequer*; but that is or ought to be always where a person is privileged; or to charge him with an action. [1]

If a person is sued in the *common-pleas*, or is supposed to be so sued, and is arrested for a pre-supposed misdemeanor, yea or for felony, an *habeas corpus* lies in the court of *Common-pleas* or *Exchequer*; and if it appears upon the return, that the party is wrongfully committed, or by one that hath not jurisdiction, or for a cause for which a man ought not to be imprisond, the privilege shall be allowd, and the person discharged from that

(*) See our author's note *ad F. N. B. 66. c.*

[1] See *Bushell's case*, *Vaughan*, 154.

imprisonment; or if it be doubtful, he may be bailed to appear in the court of *King's-bench*, which hath conusance of the crime returned. *Coke Magn. Cart. cap. 29. 2 Instit. p. 55.*

And upon this account, *P. 43 Eliz. C. B.* in the case of *Bates* that was imprisoned by the council-table, for not bringing in his subscription to the *East-India* company, and this being returned upon the *habeas corpus*, together with a writ against him out of the common-bench, they adjudged the privilege to be allowed, and the party to be discharged. (a)

But if a man be sued in the common-bench, and is arrested and imprisoned for felony, tho the gaoler, upon the *habeas corpus*, ought to return the causes, as well criminal as that where-with he is charged out of that court, yet the court of common-pleas ought not to commit him to the *Fleet*, nor discharge him of the imprisonment, nor yet to take bail of him to answer there, for they have not conusance of such crimes; the like it is, if he be returned committed for a riot or surety of the peace by justices of peace; and therefore all they can do is to take his appearance, and take him to mainprize upon the action, and remand him as to the matter of crime, for which he was well committed by the justices, and to remand his body to the sheriff's custody upon his commitment for the crime. *2 H. 7. 2. a.*

But now by the statute of *16 Car. 1. cap. 10.* they have an original jurisdiction to bail, discharge, or commit upon an *habeas corpus* for one committed by the council- [145] table, as well as the king's bench, and that altho there be no privilege for the person committed,

2. As to the *King's-bench* and *Chancery*, they have an original power both to grant an *habeas corpus*, and to bail, or discharge, or remand, as the case requires, tho there be no privilege returned. *Coke on Mag. Cart. cap. 29. 2 Instit. p. 55.* but some things they differ in.

The *king's bench* in matters civil grant their *habeas corpus ad faciendum & recipiendum*, and this is done as well in vacation as term, and returnable before any particular judge of that court, or into the court itself. [2]

(a) See *Moor* 838. & seq.

[2] Where a party is illegally or defectively committed and entitled to be discharged or bailed by a superior jurisdiction he may always obtain relief by *habeas corpus*; called in this case a *habeas corpus cum causa*. *R. v. Bowen*, 5 T. R. 158; *U. S. v. Jenkins*, 18 Johns. 305; *ex parte Wilson*, 6 Cranch, 52. Not unless the defendant is actually or constructively in custody. *Palmer v. Forsyth*, 4 B. & C. 401. *Quere*, if it appear by the return to the *habeas corpus*, that the party is in confinement under civil process issuing out of another court, absolutely void upon its face, as for example by the provisions of a statute, is the prisoner entitled to be discharged or must he apply to the court from which the process for his arrest

And if there be returned even upon that writ any civil action; and also a matter of crime, as if a person be arrested for debt, and also charged with a warrant of a justice of peace for felony; in that case, 1. If it appears to the judge or court, that the arrest for debt or other civil action is fraudulent, they may remand him. *Dyer* 249. *b. Harrison's case*. 2. If it be found real, they may commit him to the king's-bench with his causes, tho they

issued? See 14 *East*, 64, in *Burdett v. Abbott*; 1st section of the stat. 56 *Geo. 3. chap. 100*; *Com. v. Hanbright*, 4 *S. & R.* 149; 2 *Yeates*, 349; 3 *Binn.* 410; *Geyger v. Stey*, 1 *Dall.* 135. Habeas corpus lies to bring up a plaintiff already in custody in order to charge him in execution for costs of a nonsuit. *Furnivall v. Stringer*, 3 *Bing. N. C.* 96; 3 *Scott*, 551. It was allowed returnable before a judge on the circuit to bring up a prisoner confined on a *ca. sa.* in order to surrender him in discharge of bail. 1 *Penns. Reps.* 391.

The court refused to grant a habeas corpus to bring up a party in custody under an attachment to enable him to move in person to set it aside, because there was no precedent or recognized form in which the writ could issue. *Ford v. Nassau*, 1 *Dowl. N. S.* 631; 9 *Mes. & W.* 798; it was refused for the same reason to be issued, to bring up a prisoner from a county jail, for the purpose of voting for a member of parliament, in the matter of *Jones*, 2 *Ad. & E.* 436; also to bring up a defendant under sentence of imprisonment for a misdemeanor to enable him to shew cause in person against a rule for a criminal information. *R. v. Parkyns*, 3 *B. & A.* 679, n. Habeas corpus was refused to bring up a prisoner, in custody upon a criminal matter in order to have him charged with a declaration in a civil action, because the court could not change the custody and charge the prisoner again on the criminal matter, *Walsh v. Davies*, 2 *R. & E.* 245; so to bring up the body of a person under sentence for a felony, in *re Hardwick*, *W. W. & D.* 167; see in the matter of *Pilgrim*, 3 *Ad. & El.* 483; so to bring up a defendant for the purpose of changing him in execution, who is in custody under military arrest. *Jones v. Danvers*, 7 *Dowl. P. C.* 394; so to bring up a prisoner of war ad testificandum, *Deug.* 409; so for the purpose of changing the place of confinement of a prisoner from one part of the prison to another on the ground of improper classification under statute, *ex parte Rogers*, 7 *Jurist* 992. The court of king's bench will not at the mere instance of the coroner and without a strong case of necessity being made out, issue a writ of habeas corpus to bring a prisoner, who has been committed for trial on charge of the murder of A. before the coroner's jury who are sitting on the body of A. *Ex parte Wakley in re Cooke*, 9 *Jurist*, 869.

Where a commitment is wrong in form only, the court will not discharge on habeas corpus, the party must bring his writ of error. *Bethell's case*, 1 *Salk.* 348; *Com. v. Lecky*, 1 *Watts*, 56.

Those in execution upon process whether criminal or civil are not entitled to habeas corpus. *Riley's case*, 2 *Pick.* 172; *Bank U. S. v. Jenkins*, 18 *Johns.* 305; *Cable v. Cooper*, 15 *Johns.* 152; but see *Geyger v. Stey*, 1 *Dall.* 135.

Where a judgment was recovered and an execution issued thereon before the death of the plaintiff, and the defendant was committed on the execution after the death of the plaintiff, the court refused to discharge the prisoner on the summary process of habeas corpus. *Com. v. Whitney*, 10 *Pick.* 434.

Return to a habeas corpus ad prosequendum that the prisoner was too sick to be removed was held sufficient; but should be supported by affidavit of the physician, *ex parte Bryant*, 2 *Tyler*, 269.

Notice of the writ must be served on the party interested in the imprisonment. *People v. Pelham*, 14 *Wend.* 48.

Application for a habeas corpus ad testificandum may be made to a judge at chambers and such is the practice. *Browne v. Gisborne*, 2 *Dowl. N. S.* 963.

are matters of crime, for that court hath consuance, as well of the crime, as of the civil action; but then in the term of the court may take his appearance or bail to the civil action, and remand him, if they see cause, as to the crime to be proceeded on below.

But upon the writ *ad faciendum & recipiendum* there ought not singly a matter of crime to be return'd, for that belongs to the *habeas corpus ad subjiciendum*.

The other writ is the *habeas corpus ad subjiciendum*, which is for matters only of crime, and is not regularly to issue nor be returnable but in the term-time, when the court may judge of the return, or bail, or discharge the prisoner.[3]

Till the return filed the court may remand him, after it is filed the court is either to discharge, or bail, or [146] commit him, as the nature of the cause requires.

If together with the *habeas corpus* there issues a *certiorari* to remove the indictment, yet in case of [147] felony, tho the body and record be returned and filed, the court may remand him and the record by the statute of 6 H. 8. cap. 6. but in other cases the record cannot be remanded, but they must proceed in the king's bench both to pleading, trial, and judgment.

But if the body be removed by *habeas corpus*, and the record also by *certiorari*, but the record not filed, tho the return upon the *habeas corpus* be filed, a *procedendo* may issue to the court below.

And thus far for the *habeas corpus* in the king's bench.

By virtue of the statute of *Magna Charta*, and by the very common law, an *habeas corpus* in criminal causes may issue out of the *Chancery*. *Coke on Magna Charta*, cap. 29. 2 *Instil. p. 55*.

But it seems regularly this should issue out of this court in the vacation time,[4] but out of the king's bench in the term-time,

[3] There is likewise a writ of *habeas corpus ad respondendum* where a person is confined in gaol for a cause of action accruing within some inferior court, and a third person has also a cause of action against him, in which case he may have this writ in order to charge him in some superior court. So also the *habeas corpus ad satisfaciendum* where a prisoner has had judgment against him in an action and the plaintiff desires to bring him up to some superior court to charge him with process of execution. So also the writs of *habeas corpus ad prosequendum*, *testificandum*, *deliberandum*, which issue where it is necessary to remove a prisoner in order to prosecute or bear testimony in any court or to be tried in the proper jurisdiction wherein the fact was committed. *Bac. Abr. 3 Bl. Comms.* The writ *ad testificandum* is also enacted by statute 44 Geo. III. chap. 102.

[4] But see *Jenks' case*, 6 St. Trials, where Lord Nottingham refused the writ in vacation on the ground of the want of precedent.

as in case of a *supersedeas* upon a prohibition. 38 E. 3. 14. a. B. *Supersedeas* 13.

When the cause is returned, the chancellor may judge of the sufficiency or insufficiency thereof, and may discharge or bail the prisoner to appear in the king's bench, or may *propriis manibus* deliver the record into the king's bench, together with the body, and thereupon the court of king's bench may proceed to bail, discharge, or commit the prisoner.

But if the chancellor shall not discharge him, but bail him, this surety must be to appear in the king's bench; or if the chancellor shall do neither, it seems he may commit him to the Fleet till the term, and then he may be turned over to the king's bench, and there proceeded against, for the chancellor hath no power to proceed in criminal causes.

And if the *habeas corpus*, and also a *certiorari* be granted, returnable in *Chancery*, and the cause and body be returned there, they may be sent into the king's bench; if the body only be returned with his causes by *habeas corpus* into the *Chancery*, and delivered over into the king's bench, they may proceed to the determination of the return, and either by *procedendo* remand him, or grant a *certiorari* to certify the [148] record also, and thereupon commit or bail the prisoner, as there shall be cause.

But the sending an *habeas corpus ad faciendum & recipiendum* by the chancellor for persons arrested in civil causes, especially being in execution, is neither warrantable by law, nor antient usage, and particularly forbidden by the statute 2 H. 5. cap. 2. as to persons in execution.

And thus far of bailing by *habeas corpus*.

IV. Touching the writ *de odio & atia* for a man accused of manslaughter, in some places called a writ *de bono & malo* and *de ponendo ad ballium*, it is grounded upon the statute of *Magna Charta*, cap. 26. repealed by 28 E. 3. cap. 9. and revived again, as is supposed, by 42 E. 3. cap. 1. whereby all acts made against *Magna Charta* are repealed. It is a writ much out of use, but the whole learning concerning it is put together by my lord Coke upon *Magna Charta*, cap. 26. 2 *Instit.* p. 42. and upon cap. 29. 2 *Instit.* p. 55. and thither I shall refer myself.

It has been disused by reason of the great trouble in the attaining and execution of it, for, 1. There must be a writ to inquire *de vita & membris*. 2. There must be an inquisition taken. 3. He was to be bailed by twelve persons.

And now the justices of gaol-delivery usually going their circuits twice a year, unless in the four northern counties, a prisoner comes to his trial as soon, if not sooner, than such inquisition and mainprise can be taken.

And thus far of manucaption or bail by writ.

The *second* general is bailing *virtute officii*.

The court of king's bench may *virtute officii* bail any person brought before them, of what nature soever the crime is, even for treason or murder, as hath been before shewn, p. 129.[5]

Concerning bailment of felons by justices of the gaol-delivery and of the peace *virtute officii*, and the statutes relating to them, enough hath been said before.

The sheriff, it seems, might *ex officio* without writ at com-

[5] Except only, even to this high jurisdiction, such persons as are committed by either house of Parliament, so long as the session lasts; or such as are committed for contempts by any of the king's superior courts of justice. 4 *Blacks. Comms.* 300.

Where bail is grantable by the court of King's Bench to a person imprisoned by either house of parliament, there can be no doubt but the highest regard is to be paid to all the proceedings of either of those houses, and that wherever the contrary does not plainly and expressly appear, it shall be presumed that they act within their jurisdiction and agreeably to the usages of parliament and the rules of law and justice: and therefore wherever it stands indifferent upon the return of a habeas corpus, whether a commitment by either of those houses were strictly legal or not, and the parliament be still sitting, I can find no precedent that the prisoner hath been bailed by the court of King's Bench. And it cannot but be expected that those houses would be apt to resent an attempt of this kind, which might seem to carry with it an implicit reflection on their honour, as unjustly depriving a subject of his liberty and putting him under a necessity of demanding justice from another court by unreasonably refusing to restore him to it, which surely shall never be intended where their proceedings are capable of a more favourable construction. And therefore in the Lord Shafterbury's case, who, upon his habeas corpus in the king's bench was returned to have been committed by the house of lords for his contempt committed against that house, the court would not take notice of any exceptions against the form of the commitment, as that it was too general and did not express the nature of the contempt or in what place it was committed, &c. for it shall be presumed that it was such for which the Lords might lawfully make such an order, and no other court shall prescribe to them in what form they ought to make it. But if it be demanded in case a subject should be committed by either of those houses for a matter manifestly out of their jurisdiction, what remedy can he have? I answer, that it cannot well be imagined that the law, which favours nothing more than the liberty of the subject, should give us a remedy against commitments by the king himself, appearing to be illegal and yet give us no manner of redress against a commitment by our fellow subjects, equally appearing to be unwarranted. But as this is a case, which, I am persuaded, will never happen, it seems needless over nicety to examine it.

However, it seems agreed, that a person committed for a contempt by the order of either house of parliament, may be discharged by the court of King's Bench after the dissolution or prorogation of the parliament, whether he were committed during the sessions, or afterwards; for that all the orders of parliament are determined by a dissolution or prorogation; and all matters before either house must be commenced anew at the next parliament, except only in the case of a writ of error: and if the subject should be deprived of his liberty till the next parliament, which perhaps may not meet again in many years, no one could say when his imprisonment would end. 2 *Blackias*, 110.

mon law bail offenders indicted before him in his *Turn.* or upon a commission to him; but this power is in effect [149] taken away from him in cases of felony, by the statutes of 28 *E. 3. cap. 9.* and by the statute of 1 *E. 4. cap. 1.* and 1 *R. 3. cap. 3.* transferred to the justices of the peace, as hath been before declared.

The marshal of the king's bench took upon him antiently *virtute officii* to bail persons indicted or appealed; but this is wholly taken from him by the statute of 5 *E. 3. cap. 8.* [6]

3 Wilson, 172. 188.

[6] The writ of *Habeas Corpus ad subjiciendum*, being that which issues in criminal cases, and now the great and efficacious remedy in all manner of illegal confinement, has its foundations in the Great Charter of English liberties, its purpose being to carry into effect the provision of Magna Charta. "*Nullus liber homo capiatur aut imprisonetur nisi per legem terræ.*" It may be demanded, says Lord Coke, in his comment upon that statute,* if a man be taken or committed to prison "*contra legem terræ,*" against the law of the land, what remedy hath the party grieved? He may have, he continues, after giving the other remedies by action for false imprisonment, indictment, &c.; he may have an *Habeas Corpus*, upon which writ the gaoler must return by whom he was committed and the cause of his imprisonment, and if it appeareth that his imprisonment be just and lawful, he shall be remanded; but if it shall appear to the court that he was imprisoned against the law of the land, he ought by force of this statute to be discharged; if it be doubtful and under consideration, he may be bailed. It is a remedial mandatory writ, by which the king's courts of justice and judges, at the instance of a subject aggrieved, command the production of that subject and inquire after the cause of his imprisonment, and it is a writ of such a sovereign and transcendent authority that no privilege of person or place can stand against it;† it runs as the common law to all dominions held of the crown, and is accommodated to all persons and places.‡

The writ of *hominis replegiando* was the only specific remedy provided by the common law for the protection and defence of liberty against any private invasion of it; when the writ of *habeas corpus*, in its origin more strictly applicable to cases of imprisonment in its technical sense, was first applied to relieve against private restraints does not appear. As the law checked the *hominis replegiando*, the *habeas corpus* seems to have taken its place.§ There is an obiter saying by Justice Wild, in Carter, 222, of a case where the court sent a *habeas corpus* to Dr. Prujean beyond sea, for Sir Robert Carr's brother: the first case is that of Sir Philip Howard, which is mentioned in Lord Leigh's case, and, therefore must have been before that time. Lord Leigh's case was in the 27 Car. II. where a *habeas corpus* was granted to bring up his wife: and the case of Viner and Emmerton was in 27 Car. II. where a *habeas corpus* was granted to Viner to bring up his stepdaughter; from that time the Court of King's Bench has constantly granted these writs.||

Lord Coke¶ and Lord Hale** agree that at common law the jurisdiction upon the writ of *habeas corpus* extended only to its issuing out of the Court of King's

* 2 Inst. 55.

† Wilmet's Notes; 1 Burr. 631; and by resolution of the House of Lords.

‡ Palmer, 54; 2 Cro. 543.

§ Wilmet's Notes, 92, 93.

|| 2 Inst. 55; 4 Inst. 290.

¶ Ib. 96.

** Ante, 145.

Bench in term time, and the Court of Chancery in vacation;* the courts of Common Pleas exercised no general jurisdiction by means of it, but only a qualified one for the protection of their officers and suitors:† by the statute 16 Car. I. ch. 10, abolishing the Court of Star Chamber, original jurisdiction is first given to the Court of Common Pleas, co-ordinate with the King's Bench in cases of commitments by any future court pretending to have like jurisdiction with the Star Chamber, and also in case of commitments by any of the council courts, by the council board, by the king or by any of the privy council. At what time this limited jurisdiction in granting the writ became more extended does not seem very satisfactorily ascertained; it probably grew into the practice of the court as occasions demanded it; Chief Justice Wilmot thinks that the judges of the King's Bench granted the writ in vacation before the statute 31 Car. II. It seems to be agreed that, whether by virtue of the statute or not; this change in the practice was introduced about the time of its enactment;‡ and that by analogy to the statutory enactment, the common law writ now issues in accordance with it, out of the Court of King's Bench, in all cases whatsoever.§ It is now held that a judge at chambers has power at common law to issue a writ of habeas corpus returnable before himself immediately.||

There is another and still higher power, exercised by the Court of King's Bench at common law, through the medium of this writ by virtue of its general supervisory power over all the tribunals of the kingdom to protect the liberty of the subject by speedy and summary interposition.¶ As over summary convictions under statute,** or over the ecclesiastical courts.†† One of the articles of grievance presented to the Parliament by the clergy in 51st Henry III. called *articuli cleri*, and given with the answers of the common law judges in 2 Inst. 589, was that their authority was infringed by the common law courts discharging upon *habeas corpus* persons fined and imprisoned by them for offences and intolerable contempts? the judges in their answer give the rule of law upon the subject as follows: "We do not, neither will we in any wise impugn the ecclesiastical authority in any thing that appertaineth unto it; but if any by the ecclesiastical authority commit any man to prison, upon complaint unto us that he is imprisoned without just cause, we are to send to have the body and to be certified of the cause; and if they will not certify unto us the particular cause, but generally, without expressing any particular cause, whereby it may appear unto us to be a matter of the ecclesiastical cognizance and his imprisonment be just, then we do and ought to deliver him: and this is their fault and not ours. And although some of us have dealt with them to make some such particular certificate to us, whereby we may be able to judge upon it, as by law they ought to do, yet they will by no means do it; and therefore their error is the cause of this, and no fault in us; for if we see not a just cause of the party's imprisonment by them, then we ought and are bound by oath to deliver him."

The writ of habeas corpus is a writ of right and the highest writ a party can bring;‡‡ but it is not a writ of course, the court or judges are not bound to grant

* See contra 3 Blacks. Comms. 131; Wilmot's Notes, p. 100; per Coleridge, J. 1 Per. & D. 525, in re Batchelor, Canadian prisoners' case; 2 Vent. 24; Jenks' case, 6 St. Trials, &c.

† See the forms of the writ from each court; 2 Inst. 52-3.

‡ See the answers of the judges in 1758 to the questions of the House of Lords.

§ 3 Blacks. Comms. 136; 3 Hallam, 19.

¶ R. v. Batchelor, re-Canadian prisoners, 1 Per. & Dav. 516; see 1 & 2 Vict. chap. 45.

† 4 Inst. 71; 3 Blacks. Comms. 42; Letter from C. J. Parker to J. Foster, 20 Cobbett's State Trials, 1381.

** Souden's case, 4 B. & Ald. 294; Deybel's case, ib. 243; Nash's case, ib. 295; R. v. Suddis, 1 East, 306.

†† In re Bains, 1 Craig. & Phil. 31.

‡‡ Bushell's case.

the writ as of course but only on cause shown.* Chief Justice Wilmut says,† "writs of habeas corpus upon imprisonment for criminal matters, were never writs of course; they always issued on a motion grafted on a copy of the commitment; and in cases of confinement or restraint not for criminal matter, it has been the uniform uninterrupted practice both of the court of King's Bench and of the judges of that court, that the foundation upon which the writ is prayed should be laid before the court or judge who awards it. For there are many kinds of private restraint that are lawful. In domestic government, as in the case of husbands, fathers, guardians and masters, the law authorizes restraints in order to enforce a performance of those natural, moral and civil duties, which wives, children, wards and apprentices owe to their superiors in their several relative capacities; and the law has laid this check to prevent that scene of disorder and confusion, if they or any other person on their behalf, were to be at liberty without any foundation or cause shown to force a production of them in Westminster Hall or before a judge, wherever he should happen to be, whenever they pleased and as often as they pleased. There are many other lawful restraints, as all persons who are in custody upon civil process, or under special authorities created by act of parliament, proceeding 'civiliter' and not 'criminaliter' against the persons who are the objects of them; persons who are bailed, paupers in hospitals or workhouses, madmen under commissions of lunacy or confined by parish officers under the vagrant act are all under a lawful confinement. If all these persons were to have had these writs of habeas corpus of course without showing any cause or foundation for granting them, it would have been suffering this great remedial mandatory writ to have been used as a means of vexation and oppression. The check upon the writ by requiring a probable cause to be shown before it issues is only saying, 'show you want redress and you shall have it;' and if a person cannot disclose such a case himself as to show he is aggrieved, when he tells his own story, it is decisive against his being in such a condition as to want relief."

It is a very common mistake, says Mr. Hallam, to suppose that the statute 31 Charles II. enlarged in a great degree our liberties and forms a sort of epoch in their history, though a very beneficial enactment and eminently remedial in many cases of illegal imprisonment, it introduced no new principle nor conferred any right upon the subject.† Still this statute, although recognising no new principle, put into more practical shape the remedy already well known and marks an important period in the extending usefulness of the writ. The preamble of the statute recites as the grievance to be remedied, the *long detaining in prison* of persons who by the law are *bailable*: it is limited in its extent to commitments for *criminal or supposed criminal matters*; it provides for the issuing of the writ in *vacation* as well as term time, except in the case of treason or felony plainly expressed on the warrant: it extends the *jurisdiction* of the courts to its issuing as well out of the high court of Chancery or court of Exchequer as out of the courts of King's Bench or Common Pleas or either of them and in vacation it may be obtained of the Lord Chancellor or Lord Keeper or any of his Majesty's justices either of the one bench or of the other or of the barons of the Exchequer of the degree of the coif: it provides *penalties* against the judges refusing and against the officers disobeying the writ and against all others than the court to which the prisoner is bound to answer recommitting for the same offence any person bailed under the statute. There is no provision in the statute for *discharging* prisoners in any case other than where in cases of commitment for treason or felony, after praying a trial, they have not been indicted and tried by the second term of the court after their commitment; all its other provisions are pointed only to *bailing* the prisoner to appear and answer the charge.

* 3 Bl. Comm. 132; *Hobhouse's case*, 3 B. & Ald. 420; *S. C.* 2 Chitty's Reps. 207; *State v. Lyon, Cox*, 403; *ex parte Lawrence*, 5 Binn. 304; *matter of Ferguson*, 9 Johns. 239.

† Notes, 88.

‡ 3 Hallam, Const. Hist. 19.

The statute provides only for "the more speedy relief of all persons imprisoned for any criminal or supposed criminal matters."

Lord Wilmut says in his comment,* that the very able and learned men who framed the statute could not have avoided taking into their consideration writs of habeas corpus for private custody; inasmuch as three or four years before the act passed, there had been two very great cases extremely agitated in Westminster Hall upon writs of habeas corpus for private custody: but they wisely drew the line between civil and constitutional liberty, as opposed to the power of the crown; and liberty as opposed to the power and violence of private persons: they thought this power of judging might be abused in favour of the crown, but they saw no danger of abuse of it as between one subject and another; and therefore they applied the remedy to the evil they had seen and experienced, and left the law as they found it in respect of private persons.

The statutory like the common law writ is in practice of right but not of course, cause must be shown, for its issuing, such as is provided in the statute;† it is moved for in term time, and when a single judge in vacation grants it under the statute, a copy of the commitment or an affidavit of the refusal of it must be laid before him.‡

In 1758 a gentleman was detained under a pressing act passed at the preceding session of parliament; upon application of his friends for a habeas corpus some difficulty was suggested and hesitation made whether the statute of 31 Car. 2 which extends only to commitment "for criminal or supposed criminal matters," comprehended this detention. This case seeming to point out a defect in the habeas corpus act, a bill was brought into the house of commons, extending the provisions of the statute 31 Car. 2 to all cases where any person not being committed or detained for any criminal or supposed criminal matter should be confined or restrained of his liberty under any color or pretence whatsoever; and that the judge before whom such person is so brought should proceed to examine into the facts contained in the return made and into the cause of his confinement or restraint and thereupon discharge, bail or remand him &c. The bill was passed by the commons. In the house of lords certain questions were propounded to the judges relating to the status of the law of habeas corpus before and since the statute of 31 Car. 2. Upon the 25th 26th and 29th of May the judges attended the house of lords and upon these questions were of opinion 1st, That in cases not within the act 31 Car. 2 writs of habeas corpus ad subjiciendum on the law as it now stands ought not to issue of course, but upon probable cause verified by affidavit. 2d, That in cases not within the act 31 Car. 2 such writs of habeas corpus by the law as it now stands may issue in vacation by fiat from a judge of the King's Bench returnable before himself: 4th, That this practice of the issuing a habeas corpus by a single judge was introduced about the time of 31 Car. 2, but whether it was at that time or by virtue of that statute they do not entirely agree; 5th, That the judges at the common law and before the said statute were not bound to issue such writ of habeas corpus in time of vacation, upon the demand of any person under any restraint, but might refuse to award such writ if they thought proper—and may still, adds Mr. Justice Wilmut, for a copy of the commitment must be produced or there must be some case made, before the judges are or ever were bound to grant such writs at the instance of a person under restraint. But they are so bound at this day, says Mr. Baron Adams, the practice standing confirmed and established by so long an usage, in cases without as well

* Wilmut's Notes, 84.

† Ibid. 89.

‡ R. v. Marsh, 3 Bulst. 27; Hobhouse's case, 3 B. & Ald. 422. "A single judge in cases under the statute 31 Car. 2. may perhaps be obliged to grant the writ as of course;" but this does not extend to the court. Per Best, J. in Hobhouse's case.

§ See this bill in Wilmut's Notes 77. It extends 31 Car. 2 to all cases of confinement or restraint, and provides for inquiry into the facts contained in the return, but excludes from this latter provision cases "of commitment for criminal or supposed criminal matters."

as under the statute. 6th, That the judges at the common law and before the statute were not bound to make such writs issued in time of vacation returnable immediately, nor could they enforce obedience to such writ issued in time of vacation if the party served therewith should neglect or refuse to obey the same—and cannot, says Mr. Justice Wilmot, whether such writs issue in cases under or without the statute. But they would enforce obedience thereto at the next term of the court by attachment, say Barons Smythe and Dennison and Lord Chief Justice Willia. 7th, That if the judge before the statute should have refused to grant the said writ on the demand of any person under any restraint, the subject had not any remedy at law by action or otherwise against the judge, for such refusal. He would, says Mr. Baron Smythe, have been liable to punishment in the same manner as for any other breach of his duty. 8th, That in case a writ of habeas corpus ad subjiciendum at common law were directed to any person returnable immediately, such person might before the statute have stood out *an alias and pluries*; but that since the statute the practice had been to grant an attachment upon disobedience of the first writ; and that, in case of writs issuing without as well as under the statute. 9th, That the statute 31 Car. 2 and the several provisions therein made for the immediate awarding and returning the writ of habeas corpus, do not extend to the case of any compelled against his will, in time of peace, either in the land or sea service without any color of legal authority, or to any case of imprisonment, detainer or restraint whatsoever, except cases of commitment or detainer for criminal or supposed criminal matters. But, adds Mr. Justice Bathurst, in favor of liberty the judges of the court of King's Bench have, in conformity to that statute, extended the same relief to all cases. To the 10th question “whether in all cases whatsoever the judges are so bound by the facts set forth in the return to the writ of habeas corpus, that they cannot discharge the person brought up before them, although it should appear most manifestly to the judges by the clearest and most undoubted proof, that such return is false in fact and that the person so brought up is restrained of his liberty by the most unwarrantable means and in direct violation of law and justice;” Justices Noel, Bathurst and Clive, Baron Legge and Lord Chief Justice Willes answered generally in the negative. Mr. Justice Wilmot answered “that in no cases whatsoever, the judges are so bound by the facts set forth in the return to the writ of habeas corpus that they cannot discharge the person brought up before them, if it should appear most manifestly to the judges by the clearest and most undoubted proof, that such return is false in fact; and that the person so brought up is restrained of his liberty by the most unwarrantable means and in direct violation of law and justice; but by the clearest and most undoubted proof he means the verdict of a jury or judgment on demurrer or otherwise in an action for a false return; and in case the facts averred in the return to a writ of habeas corpus are sufficient in point of law to justify the restraint, he is of opinion, that the court or judge before whom such writ is returnable cannot try the facts averred in such return by affidavits in any proceeding grafted upon the return to the writ of habeas corpus.” Mr. Baron Adams and Lord Chief Baron Parker answered to the same effect. Mr. Baron Smythe answered “That the judges are so bound by the facts set forth in the return to the writ of habeas corpus, that they cannot enter into proof by affidavits to controvert the return; the facts set forth in the return can be controverted or contradicted only by the verdict of a jury.” Mr. Justice Dennison, answered “That in all cases whatsoever where the return consists of facts justifying the taking and detaining by law, the judges are so bound by the facts set forth in the return to the writ of habeas corpus, that they cannot discharge the person brought up before them upon affidavits to be read in that proceeding, contradicting the facts contained in the return; but if it should appear most manifestly to the court by the clearest and most undoubted proof, either in action or in some collateral proceeding, that such return is false in fact and that the person so brought up is restrained of his liberty by unwarrantable means and in direct violation of law and justice, the prisoner may be discharged.” Sir Michael Foster who was absent agreed with Chief Baron Parker upon all the questions but the tenth, upon that he answers “God forbid

that they should be so bound;" and see his argument in a letter to the chief baron in the Addenda to 20 St. Trials 1376.

After these opinions the bill of the commons was thrown out by the lords upon a second reading and the judges were ordered to prepare a bill to extend the power of granting writs of habeas corpus ad subjiciendum in vacation time, not within the statute 31 Car. II. ch. 2 to all the judges of his majesty's court at Westminster and to provide for the issuing of process in vacation time to compel obedience to such writs: and that in preparing such bill they take into consideration whether in any and in what cases it may be proper to make provision that the truth of the facts contained in the return to a writ of habeas corpus may be controverted by affidavits or traverse, and so far as it shall appear to be proper, that clauses be inserted for that purpose and that they lay such bill before the house in the beginning of the next session of parliament. The subject was not then resumed in parliament. See 15 *Cobbett's Parliamentary History* 898. *Bacon's Abr. tit. habeas corpus*. A bill was however prepared. See it in a note to 20 St. Trials 1383, and from this bill, no doubt, was drafted the statute 56 Geo. III. ch. 100, enacted fifty-eight years afterwards, the two are almost identical in their provisions. The bill prepared by the judges in 1758 authorized the court to inquire into the truth of returns either summarily upon affidavits or by directing an issue; the statute of 1816 gives no power to direct an issue. The bill of 1758 also put it in the power of the court to make such order for the payment of the charges for bringing up the prisoner as they should see fit, this power is omitted in the statute 56 Geo. III.

In further explanation of the state of the law and the practice at that time upon this subject, the following passages are taken from Sir Michael Foster's letters to the solicitor-general Yorke and chief justice Parker:—"The practice of granting writs of habeas corpus in the vacation in cases not within the habeas corpus act having long prevailed, I confess that I did not entertain any sort of doubt touching the legality of it, though possibly there might have been some room for a doubt if the passage in Lord Hale's which you mentioned, and that in 2 Inst. 53, had been considered independently of the practice. But as I always considered the case of a barely wrongful detention as not within the habeas corpus act, but merely at common law, I thought a legal sound discretion ought to be used and generally expected an affidavit on behalf of the party applying for the writ, setting forth some probable ground for relief upon the merits of his case. This method I constantly observed in the case of men pressed into the service; and that the public service might not suffer by an abuse of the writ, I ordered notice to be given to the proper officers of the crown, of the time at which the party was to be brought before me with copies of the affidavits. In this way several were discharged and I must say that in some instances I saw so much oppression on the part of those concerned in that service, that I am satisfied the subject ought to have some better relief than what the pressing acts have provided." "From the few notes which I have relating to that matter, impressment, I find that the court has not granted the writ as of course and within the habeas corpus act, but has required affidavits on behalf of the party applying for it, setting forth the merits of his case: and on the other hand, though proper returns in point of form may have been made, the court has not given entire credit to them and put the party complaining to his remedy for a false return; but has constantly entered into the merits of the case upon affidavits and either discharged or remanded the party as the case has appeared." In his letter to Lord Chief Baron Parker he says "I agree with your lordship in the truth of the general doctrine, that a return to a writ of habeas corpus is conclusive in point of fact. It cannot be traversed; the court is bound by it and the injured party is driven to his action. This I admit is the general rule; but I think that it is not universally true. Cases may be put which are exceptions to it; and exceptions do not, as your lordship well knows, destroy, but rather establish a general rule. The case of persons pressed into the service, is, I conceive, one of them, for this plain

* Appendix to 20-St. Trials.

† 2 Hale, 145.

reason, that if the party cannot controvert the truth of the facts set forth in the return, he is absolutely without remedy. An inadequate ineffectual remedy is no remedy; it is a rope thrown out to a drowning man which cannot reach him or will not bear his weight. It is the offering of bangles to the children of one's family, when they are crying for bread. In common cases, in every case where the general rule is laid down, the injured party must wait with patience till he can satisfy the return in a proper action. This it must be confessed is a great misfortune; but till the day of his deliverance comes, he continues at home in the custody of the law and under its protection. This, your lordship knows, is not the case of a man pressed into the service by land or sea, supposing him to be no object of the law. He is taken from the Exchange or from behind his counter, no matter whence, and thence to the Savoy or aboard a tender, and if his friends happen to have time enough to procure a habeas corpus, a sufficient return to the writ is immediately made, there are precedents enough in the crown office and they are soon copied, and the man is sent away in due form of law, to take his chance, for some years perhaps amidst the perils of the sea and the disasters of war. But it is said that he is not without a remedy. What remedy? An action against a man perhaps not worth a groat. But how responsible soever the officer may be, what satisfaction in damages is equal to the injury? or if it were possible to be had, what becomes of the action if the plaintiff should be knocked on the head in the service? Why, truly *moritur cum persona*. In short he has in this view of the case no remedy, unless you give him what I call the specific remedy, a right to controvert the truth of the return before it is too late." "The principle is, that though in common cases, the return is conclusive in point of fact, yet these special cases as they come not within the general reason of the law are not within the general rule. The parties are without remedy, if they are not to controvert the truth of the return in a summary way and therefore they shall do it."

It would seem from this subject having been dropped as it was in parliament, and no statutory provision made in regard to it, until fifty-eight years afterwards, that this practice of the court in cases of a restraint of liberty indefinite in time, was considered sufficiently to protect the liberty of the subject. That there were in practice exceptions to the rule, not to inquire into the facts of the return, agrees with what Mr. Hawkins says before the statute 56 Geo. 3. on the same subject: though the second case cited by him would seem more properly reconcilable on the ground of the general supervisory power of the King's Bench in all matters of liberty, as before mentioned. He says "it seems to be agreed that no one can in any case controvert the truth of the return to a habeas corpus or plead or suggest any matter repugnant to it, yet it has been holden that a man may confess and avoid such a return by admitting the truth of the matters contained in it and suggesting others not repugnant which take off the effect of them, and upon this ground when one Swallow a citizen of London was committed for refusing to accept the office of an alderman of the said city to which he had been elected and the custom of the city justifying a commitment for such refusal and the election and refusal were set forth in the return to the habeas corpus, he filed a suggestion in the crown office that he was an officer of the king's mint and that all such officers were exempted from all city offices, both by prescription and by the king's charter and thereupon the patent of the grant of his office and also the patent of his exemption being produced he was discharged. Also the court will sometimes examine by affidavit the circumstances of a fact on which a prisoner brought before them by a habeas corpus has been indicted, in order to inform themselves on examination of the whole matter whether it be reasonable to bail him or not: and agreeably hereto one Jackson who had been indicted of piracy before the sessions of admiralty on a malicious prosecution brought his habeas corpus in the said court in order to be bailed, the court examined the whole circumstances of the fact by affidavit; upon which it appeared that the prosecutor himself, if any one, was guilty and carried on the present prosecution to screen himself, and thereupon the court, in consideration of the unreasonableness of the prosecution and the uncertainty of the time when another sessions of admiralty might be holden, admitted the

said Jackson to bail and committed the said prosecutor till he should find bail to answer the facts contained in the affidavits.*

The statute 56 Geo. III. ch. 100, sect. 3, enacts "that in all cases provided for by this act although the return to any writ of habeas corpus shall be good and sufficient in law, it shall be lawful for the justice or baron before whom such writ may be returned to proceed to examine into the truth of the facts set forth in such return by affidavit or by affirmation," &c. The cases provided for in the act are "where any person shall be confined or restrained of his or her liberty, otherwise than for some criminal or supposed criminal matter and except persons imprisoned for debt or by process in any civil suit," &c.

If a husband confine his wife, she may have a *habeas corpus* for her relief;† so a husband may by this writ reclaim the custody of his wife;‡ so a husband or wife may have the writ to obtain the custody of a child improperly detained.¶ It lies for improper military detention;|| so to try a negro's right to freedom;¶ or an apprentice,** though not for a master to recover back his apprentice, but the apprentice must pray the writ himself, "to shew a restraint;" the master's complaint would properly be remedied by action, not by this writ.†† It does not lie for an alien enemy, however ill used or deceived.††

A *habeas corpus* will be granted if there be delay of prosecution;§§ ill health of the prisoner is not sufficient ground to induce the court to interpose;||| it is the only means by which the sufficiency of a commitment can be tried, the fact of the prisoner being too poor to afford the expense of the writ will not induce the court or judge to dispense with it and hear the prisoner on an application for his discharge without it, although it be perfectly clear that the warrant is defective.¶¶ The court will not grant the writ on the application of another until it is first shewn why the application is not made by the prisoner himself.*** The judge cannot make it a part of the rule for issuing the writ of *habeas corpus* that the party shall not bring an action against the magistrate by whom it is alleged that he has been improperly committed.†††

* 2 Hawkins, chap. xv. sects. 78-79; *R. v. Acton*, 2 Stra. 851; see 7 Mod. 234, and Mr. Hill's argument in *R. v. Batchelder*, 1 Per. & D. p. 551 that there exists a right at common law to inquire into the truth of returns.

† 2 Lev. 128; re Cochran, 8 Dowl. 630.

‡ *R. v. Mead*, 1 Burr. 542; *Anne Gregory's case*, 4 Burr. 1991; *R. v. Winton*, 5 T. R. 89.

§ *R. v. Manneville*, 5 East, 221; *R. v. Masely*, 5 East, 324; ex parte Bailey, 6 Dowl. 311; *U. States v. Green*, 3 Mason, 492; *Com. v. Hammond*, 10 Pick. 274; *Com. v. Hamilton*, 6 Mass. 273; *Com. v. Briggs*, 16 Pick. 203; *Nichols v. Giles*, 2 Root, 461; *Mercein v. The People*, 25 Wend. 64; *Com. v. Addicks*, 5 Binn. 520; see *State v. Cheseman*, 2 South. 445.

|| *R. v. Suddis*, East, 306; *Deybel's case*, 4 B. & Ald. 243; *Nash's case*, ib. 295; *Com. v. Harrison*, 11 Mass. 63; *Com. v. Cushing*, ib. 67; *Com. v. Chandler*, ib. 83; *matter of Ferguson*, 9 Johns. 239; *matter of Stacey*, 10 Johns. 328; *State v. Brearley*, 2 South. 555; *Com. v. Robinson*, 1 S. & R. 353; *U. S. v. Anderson*, Cook, 143; *Com. ex rel. Dougherty v. Captain C. J. Biddle*, Supreme Ct. of Penna. March 13, 1847.

¶ *Somersett's case*, 20 St. Trials, 1; *State v. Lyon*, Core, 403; see *Belt v. Dalby*, 1 Dall. 167.

** Ex parte Lansdowne, 5 East, 38; *Pennsylvania v. Montgomery Addis*, 262.

†† The king v. Reynolds, 6 T. R. 497; *R. v. Edwards*, 7 T. R. 745.

‡‡ Case of the three Spanish sailors, 2 W. Blacks. 1324.

§§ *R. v. Wyndham*, 1 Stra. 4.

||| 1 Stra. 45; but see *R. v. Bishop*, 1 Stra. 9, where one convict of libel was admitted to bail on the ground of ill health before judgment was passed; see *J. S. v. Jones*, 3 Wash. C. C. 224.

¶¶ Ex parte Martins, 9 Dowl. 184.

*** Canadian prisoners' case, 5 Mes. & Wels. 33; see the case of the Hottentot Venus, 13 East, 195; See *R. v. Middleton*, 1 Chitty's Reps. 654.

††† Ex parte Hill, 3 Car. & P. 225.

A writ of habeas corpus ad subjiciendum granted by a judge of the king's bench must issue from the crown side of the court where the prisoner is in custody for a criminal matter; but if issued out of the plea side it is irregular only and the irregularity may be waived by neglecting to object to it in due time.*

The writ must be directed to him against whom it is issued whether he be a public officer or a private person.† A peer has no privilege against this writ issued out of the king's bench and directed to him.‡

It must be served by statute 31 Charles II. "on the officer to whom it is directed or left at the gaol or prison with any of the under officers, under keepers or deputy of the said officers or keepers." In order to entitle to the penalty provided by the fifth section of the statute 31 Car. II. the construction is that if the governor of the gaol be present, there is then no deputy or under keeper on whom a service can be made, but if the governor be not present, then the deputy may be served, and if the deputy have no deputy, then in the absence of the deputy service may be made on the turnkey or may be left at the gaol, for it is the duty of the governor to leave some person in his place. But if the gaoler be in the gaol and accessible, the demand must be made on him and if he be not accessible it may be on the deputy, and at all events the demand should be served in such a way that the person to whom it is delivered may understand its nature, and when the principal is within the gaol, some pains should be taken that it should come to his hands.§

A party may be brought into court in term time upon a habeas corpus issued in vacation.¶ The court will not receive the return till the return day.†

The method to *compel a return* is by taking out an *alias* and *pluries* which if disobeyed an attachment issues of course; the court may also make a rule on the officer to return his writ, and if disobeyed, they may proceed against such disobedience in the same manner as they usually do against the disobedience of any other rule;** but an attachment may be granted for making an insufficient return to the *first writ*, without issuing an *alias* and *pluries*;†† at common law as well as under the statute.‡‡

C. J. Vaughan says, in *Bushell's case*, that the writ commands the day and the cause of the caption and detaining§§ to be certified upon the return, which if not done the court cannot possibly judge whether the cause of the commitment and detainer be according to law or against it; therefore the cause of the imprisonment ought by the return to appear as specifically and certainly to the judges of the return as it did appear to the court or the person authorized to commit, else the return is insufficient.¶¶ But Lord Ellenborough doubts in *Burdett v. Abbott*†† that this law can be sustained by later authorities. The return must answer the taking as well as the detaining;*** it must be particular and cer-

* In *re Eaton*, 9 Dowl. P. C. 207; 4 Per. & D. 558; and see in *re Douglas*, 12 Law, J. N. S. 963.

† Godb. 44 Mich. 28 & 29 Eliz.; held in Pennsylvania that it cannot be directed to the bail of one criminally charged. *Resp. v. Arnold*, 3 Yeates, 263.

‡ 1 Burr. 631, and by resolution of the house of lords.

§ *Huntley v. Lescombe*, 2 B. & P. 530.

¶ *R. v. Mead*, 1 Burr. 542; and see the 2d and 6th sects. of the stat. 56, Geo. III. ch. 100.

† *Mash's case*, 2 W. Blacks. 805.

** 2 Lev. 128-9; *State v. Raborg*, 2 South. 545.

†† 31 Car. 2 sect. 1; *R. v. Winton*, 5 T. R. 80; *matter of Stacey*, 10 Johns. 396.

‡‡ *Ex parte Bosen*, 2 Ld. Kenyon, 289; and see the answers of the judges in 1758, *supra*.

§§ In the case of the five baronets imprisoned by order of the king for refusing the Forced Loan, and brought up on habeas corpus November, 1627, objection was taken to the return that it stated no cause of *caption*; it was answered that the writ, in that case, did not call for it. 7 St. Tr. 113.

¶¶ *Vaughan*, 137.

†† 14 East, 73; and see Sir Vicary Gibbs' arg. at p. 91 to the same effect.

*** *Harman's case*, 2 W. Bl. 1204; but see *R. v. Wilkes, Wilson*, 158.

tain;† the court will not allow to be supplied by affidavits matter which ought to be contained in the return;‡ in commitment for aiding the escape of a traitor, it should be averred in the return that treason was committed, and in commitment for treason, the sort of treason should be specified;§ commitments under authority of statutes must strictly follow the power;¶ where a commitment is in court to a proper officer then present, there is no warrant of commitment; and therefore he cannot return a warrant in *hæc verba*, but must return the truth of the whole matter under peril of an action, but if he be committed to one that is not an officer, there must be a warrant in writing, and where there is one it must be returned, for otherwise it would be in the power of the gaoler to alter the case of the prisoner and make it either better or worse than it is upon the warrant; and if he may take upon him to return what he will he makes himself judge, whereas the court ought to judge and that upon the warrant itself;|| where after a rule for a *habeas corpus* has been granted, a warrant is issued which renders the custody lawful the court will discharge the rule;¶ the omission to name the committing magistrate “justice of the peace” in the warrant is cured by so styling him in the return.** Upon a return to a *habeas corpus*, the court will not give any direction or advice to the gaoler as to the matter of which his return should consist.†† The general form of denial is “that the party has not the person in his possession, custody or power,” and the court are jealous of deviation from this usual form.‡‡ In *Wilkes’ case*§§ some question was made whether a return by the officers, who had arrested him, “that he was not then, nor at the time of the service of the writ upon them, in their custody or control,” was sufficient, or whether they should not be required to state, into whose custody they had delivered him, but the point was not decided. The magistrate, together with the commitment, returns the depositions upon which it was founded, in order that the court may be furnished with the means of judging in what way they shall dispose of the prisoner, and although the commitment be defective, the court will remand the prisoner if it appear on reading the depositions that there is fair ground for so doing;||| but where the party is in custody under sentence of a court of jurisdiction competent to try his offence it is sufficient to return that fact, without stating the particulars of the original charge against him.¶¶ Return of commitment held insufficient unless averring that it was to a proper officer; aliter, if it otherwise appear;*** return, “that he had delivered the woman to her husband, knows not where she is and can’t produce her,” held sufficient;††† return to a *pluries writ* “*nullum habeo talem in custodia mea, nec habui die impetrationis brevis nec unquam postea*” held bad, because not constat that he may not have had him at the time of the first writ;‡‡‡ return

* *Kendal’s case*, 5 Mod. 83; see Lord Coke’s Speech in the House of Commons, 7 St. Trials, 199; in *re Fletcher*, 1 Dowl. & L. 728.

† *R. v. Smith*, 7 Mod. 234.

‡ *R. v. Kendal*, 1 Ld. Raym. 67; contra *R. v. Wyndham*, 1 Stra. 3.

§ *Bracy’s case*, 1 Salk. 348; *Deybel’s case*, 4 B. & Ald. 243; *Souden’s case*, 4 B. & Ald. 294; in *re Peerless*, 1 Ad. & El. 143; in *re Douglas*, 3 Ad. & El. 825; *R. v. King*, 1 D. & L. 271.

|| *R. v. Clerk*, 1 Salk. 349.

¶ *Ex parte Dauncey*, 8 Jurist. 829.

** *King v. Fownes*, 2 Show. 182.

†† In *re Fletcher*, 1 Dowl. & L. 726.

‡‡ *Per Grooe, J.*, *R. v. Winton*, 5 T. R. 91; *Matter of Stacey*, 10 Johns. 328.

§§ 2 Wilson, 154.

||| *R. v. Marks*, 3 East, 157; *ex parte Krans*, 2 D. & R. 411; 1 B. & C. 258; *R. v. Nash*, 4 B. & Ald. 295. In the case of *The King v. Marks*, the Court of King’s Bench after examining the depositions returned upon certiorari, discharged from the commitment of the justices of the peace and recommitted the prisoner in proper form of the offence appearing. This is mentioned in the report of the case as a practice adopted at this time; the former practice having been to draw up a rule remanding in general terms to the same custody.

¶¶ *R. v. Soddie*, 1 East, 306.

*** *R. v. Clerk*, 12 Mod. 114.

‡‡‡ *R. v. Wright*, 2 Stra. 315.

‡‡‡ *R. v. Viner*, 2 Lev. 128.

"I had not at the time of receiving this writ nor have I since had the body of A. B. detained in my custody," held bad on account of the word *detained*.^{*} The return should always disclose a good cause of detainer and in some cases the proof; it will not be invalid for mere want of form, if it disclose a good cause of detainer; it is said not to require minute correctness in statement, if the substance of the facts is stated.[†] On habeas corpus bringing up a party committed by justices for not finding sureties of the peace, the court will not hear affidavits controverting the facts alleged in the articles of the peace, the statute 56 Geo. III. does not affect the practice in this respect.[‡] The court are bound to receive the facts stated upon the return as true in the first instance; where the party makes his return from documents which he may have never seen, he does so at his peril, he is bound by the assertion which he makes on their credit.[¶] Where there is an untruth on the face of the return, and therefore a *prima facie* case for the court to call upon the party who has made the untrue statement to account for his having done so, a rule nisi for an attachment will be granted.^{**} The return need not be supported by affidavit not verified on oath, nor has such ever been the practice.^{††}

Before the return is filed any defect in form or the want of an averment of a matter of fact may be amended, but this must be at the peril of the officer, in the same manner as if the return were originally what it is after the amendment made; and amendment may be made after the return filed in the discretion of the court; and this without the consent of the prisoner.^{‡‡}

Upon the return being made the prisoner's counsel may move to file it and have the prisoner called into court and the return read, after which the counsel may argue for his discharge.^{¶¶} The court may bail a prisoner pending the debate whether the return to the writ is sufficient;^{***} but not before the return of the writ.^{†††} Upon the return the court will only inquire into the propriety of the detention, not of the caption, as in civil cases; they will look into the depositions to see if there is sufficient ground laid to detain the prisoner in custody, and if there be not will bail him; and so if the warrant of commitment be irregular, and a serious offence shown to have been committed, they will not discharge or bail the prisoner without first looking into the depositions to see if there is sufficient evidence to detain him in custody.^{§§§} Where the defendants were in detention on board a vessel for smuggling and suspicion of murder, though held without warrant or commitment, the court refused to say that the time of detention had been unreasonable and the original cause of detainer being a lawful one, they committed the prisoners to the custody of the marshal to be taken before a magistrate.^{||||}

* R. v. Winton, 5 T. R. 89.

† R. v. Nash, 4 B. & Ald. 295; Deybel's case, ib. 243; Soudin's case, ib. 294; see R. v. Rogers, 3 D. & R. 607; ex parte Beeching, 4 B. & C. 136.

‡ R. v. Bethel, 5 Mod. 19; R. v. Nash, 4 B. & Ald. 295.

§ Barnes' case, 2 Roll. Rep. 157; per Lord Denman, C. J. in R. v. Batchelder, 1 Per. & D. 547; and per Littledale, J. p. 560; per Lord Abinger, 5 Mea. & Wels. 47.

¶ R. v. Dunn, 13 Ad. & E. 599; see in re Carus Wilson, 9 Jurist. 393; in re Clarke, 6 Jur. 757; R. v. Douglas, 7 Jur. 39.

¶¶ R. v. Batchelder, 1 Per. & D. 549; per Denman, C. J.

** Ib. 567.

†† Ib. 559.

‡ 1 Mod. 102, 103.

§§ R. v. Batchelder, 1 Per. & D. 528, 567.

|||| In re Clarke, 2 Ad. & El. 624; 6 Jurist. 757.

¶¶ Burn.

*** R. v. Bethel, 5 Mod. 23; Bollman & Swartwout's case, 4 Cranch, 123.

††† Bac. Abr. tit. Hab. Corp. p. 433.

|||| 1 Anstr. 85; 3 East, 89, 167; ex parte Scott, 9 B. & C. 446.

§§§ R. v. Homer & Abr. Cald. 296; 1 Leach, C. C. 305; Taylor's case, 5 Cowen Reps. 39; Com. v. Hickey, 3 Penna. Law Journal, 91; Com. v. Crans, 3 Penna. Law Journal, 459.

||||| Ex parte Krans, 1 Barn. & Cress. 258; see R. v. Greenwood, 2 Stra. 1136; R. v. Marks, 3 East, 162.

In cases of writs of habeas corpus directed to private persons to bring up infants, the court is bound ex debito justitiæ to set the infant free from an improper restraint, but they are not bound to deliver them over to any body nor to give them any privilege, this must be left to their discretion according to the circumstances that shall appear before them; there is a privilege *reduendo* unless when the court see ground to declare the contrary.*

Where upon the return the commitment appears to be for a *contempt*, if the court which has so committed the prisoner be of superior jurisdiction or equal with that from which the habeas corpus issued, there seems to be no power to inquire into the nature or sufficiency of the *contempt* and the return of the fact alone is enough: in Lord Shaftesbury's case the court of King's Bench refused to consider the matter, a commitment by the peers for contempt, holding they had no jurisdiction; so in the King v. Paty† the eleven judges against Holt, C. J. held that they could not inquire into the question whether it was a *contempt* of the commons or not, for which they had committed the defendant, that question was for the commons alone and they had decided it. In the King v. Murray‡ which was a question on habeas corpus of the legality of a commitment of the commons for a contempt, the court say "it need not appear to us what the contempt was, for if it did appear we could not judge thereof, the house of commons is superior to this court in this particular." In the case of the King v. Sir Thomas Darnell§ the court held the commitment returned to the habeas corpus sufficient although it stated no cause whatever, because they had no jurisdiction to look into the causes of commitment by the privy council; but this case is one of those which caused the petition of rights.¶ In Brass Crosby's case** the reason given why the court cannot interfere with the commitment of the house of commons for contempt is "that the commitment being an execution by the judgment of a court having a competent jurisdiction, this court in such case is not a court of appeal;" and Chief Justice De Grey says†† "if the Court of Common Pleas should commit a person for a contempt, the Court of King's Bench would not inquire into the legality or particular cause of the commitment, if a contempt was returned, yet in some cases the Court of King's Bench is a court of inquiry, but in this case is only co-ordinate with this court." The Chief Justice further says "that every court must be the sole judge of its own contempts."‡‡ But this would seem more properly to apply only to the inquiry of courts of co-ordinate or superior jurisdiction. Bushell's case§§ was a review by the common pleas of a commitment by the sessions of oyer and terminer for a contempt, the cause was inquired into on habeas corpus and the prisoners discharged, and Chief Justice Vaughan in his opinion in this case cites|| two cases from Moor where upon habeas corpus from the King's Bench the general return of "commitment by the Lord Chancellor for a contempt," without setting it forth, was held insufficient and the prisoners were discharged. The judges in Shaftesbury's case¶¶ make a distinction between inquiry into commitments by inferior and those by superior courts, and Wilde J. in that case says "the return no doubt is illegal, but the question is a point of

* R. v. Sir Francis Blake et al. Burr. 1434 and cases cited; Comth. v. Hammond, 10 Pick. 274; Comth. v. Hamilton, 6 Mass. 273; Comth. v. Briggs, 16 Pick. 203; Nichols v. Giles, 2 Root, 461; Comth. v. Addicks, 5 Binn. 520; Comth. v. Robinson, 1 S. & R. 355.

† 2 St. Trials, 615; see 2 Hawkins, 110, same in R. v. Flower, 8 T. R. 314; see Mr. Hallam's observations on this subject, 3 Const. Hist. 378, et seq.

‡ Salk. 503; the same doctrine has been recognised by the Supreme Court at Washington as to commitments by the House of Representatives, Anderson v. Dunn, 6 Wheat. 204.

§ 1 Wilson, 299.

|| 7 St. Trials, 113.

¶ See the cases cited in Moor 839, where persons so committed had been delivered on habeas corpus in the reign of Elizabeth.

** 3 Wilson, 199; and see per Lord Ellenborough in *Burdett v. Abbott*, 14 East. 152.

†† p. 200.

‡‡ p. 301.

§§ Vaughan, 135.

|| p. 139.

¶¶ 2 St. Trials, 615; and see to the same point Vaughan, 140.

jurisdiction, whether it can be examined here, "this court has no jurisdiction of the cause and therefore the form of the return is not considerable." As to the interference of one court with the commitments, for contempts or otherwise, of another, how far they will scrutinize the return and whether they will not more closely scrutinize the return of an inferior than of a superior court, see Mr. Holroyd's argument in *Burdett v. Abbott*.^{*} The doctrine that a court will not review on habeas corpus the commitments for contempt of another court, but that each is to be the absolute judge of its own contempt, was rejected by the Court of Errors of New York in the case of *Yeates v. The People*.[†] It has been held that the Supreme Court of the United States will not inquire on writ of habeas corpus into the sufficiency of the cause of commitment for contempt by a United States court of competent jurisdiction.[‡]

There seems to be no precedent in the English law for a writ of error to the decision of a court upon habeas corpus;§ in the case of the *King v. Paty*|| upon which an argument is sometimes made to that purport,¶ the answer of the ten judges, that the writ of error was of right and not of favour in that case, expressly excluded the conclusion that a writ of error is at all proper to a decision upon habeas corpus, they say, "but we give no opinion whether a writ of error does lie in this case, because that is proper to be determined in parliament where the writ of error and record are returned and certified."^{***} This question can hardly be considered an open one in England.†† In New York it has been decided in the affirmative.‡‡ In Virginia it has been so enacted by statute. It has been said in Pennsylvania that no writ of error lies to a decision upon habeas corpus.§§ Whether a writ of error lies from the Supreme Court of the United States to the decision of an inferior court upon the return of a writ of habeas corpus, whether a State court the case coming within the judiciary act||| or a court of the United States, came up for decision in the case of *Holmes v. Jennison et al.*;¶¶ the court was divided upon another question in the cause, but upon this question Chief Justice Taney together with justices Story, McLean, Wayne and Catron held and decided in the affirmative; justices Thompson and Barbour, who differed upon another ground, expressed no opinion upon this question, and Mr. Justice Baldwin alone held that no writ of error would lie to a decision upon habeas corpus; see his able opinion upon this point^{***} and where he contends,††† that though the opinions delivered by the majority if not all the other judges, is different from his, yet as no judgment has been rendered this point cannot be considered judicially settled, that it is yet open to the argument of counsel whenever a similar case arises and of consequence remains open for the consideration of the court or any of its members there or elsewhere as it had hitherto been considered.

A prisoner who sues out a writ of habeas corpus ad subjiciendum is not bound by the decision of any one court but is entitled to take the opinion of all as to the

* 14 East, 62; and see the case of the sheriff of Middlesex, 11 Ad. & El. 273.

† 6 Johns. Reps. p. 519; but see the New York statute of 1880 which provides that if on return to the writ of habeas corpus, it appears that the prisoner was committed for contempt by any competent authority he shall be remanded.

‡ Ex parte Kearney, 7 Wheat. 38.

§ That it does not lie, see case of the city of London, 8 Co. Reps. 253; R. v. Dean and Chap. of Trinity College, 8 Mod. 27; S. C. Stra. 653.

|| 2 Salk. 503; 2 Ld. Raym. 1105.

¶ See *Yeates v. The People*, 6 Johns.

** See note to *Burdett v. Abbott*, 14 East, p. 92.

†† See Mr. Holroyd's elaborate argument in *Burdett v. Abbott*, 14 East and where he concedes it, though it would have been very important to his case if he could have contested it; in Mr. Fry's introduction to the Canadian prisoners' case, his opinion is different.

‡‡ *Yeates v. The People*, 6 Johns. Reps.

§§ Comth. ex rel. *Crispin v. Jones*, 3 S. & R. 167.

||| See *Sergt. v. Jones*, 3 S. & R. 167.

¶¶ See *Sergt. v. Jones*, 3 S. & R. 167.

¶¶ 14 Peters Reps. 549.

††† p. 628.

propriety of his imprisonment.* In the Aylesbury cases writ after writ of habeas corpus was taken.† It has been held in Pennsylvania that the Supreme Court are not bound to grant the writ when the case has been heard by the court of Common Pleas on the same evidence, though they have the power to do so if they think it expedient.‡

The Constitution of the United States provides that "the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it." It has never yet been suspended in the United States; in January 1907 a bill passed the Senate for its suspension but was rejected in the House of Representatives by a large majority.

By the 14th section of the act of Congress of Sept. 24, 1789; the courts of the United States have power "to issue writs of scire facias, habeas corpus and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law." And that either of the justices of the Supreme Court as well as the judges of the district courts shall have power to grant writs of habeas corpus for the purpose of inquiry into the causes of commitment: Provided that writs of habeas corpus shall in no case extend to prisoners in gaol; unless when they are in custody under or by colour of the authority of the United States or are committed for trial before some court of the same or are necessary to be brought into court to testify." In construction of this act it has been held that the phrase "the writs shall be agreeable to the principles and usages of law" means those general principles and those general usages which are to be found, not in the legislative acts of any particular State, but in that generally recognised and long established law which forms the substratum of the laws of every State.§

The Supreme Court may grant the writ of habeas corpus *ad subficiendum* also the writ *ad prosequendum*, *testificandum et deliberandum*, but not the writ *ad respondendum* nor *ad satisfaciendum* nor the *habeas corpus cum causa*.|| Habeas corpus lies to a circuit court of the United States sitting in a State;¶ or to the Circuit Court of the District of Columbia.** As the jurisdiction of the Supreme Court is appellate, it must be shown to the court that they have power to award the writ before it will be granted.†† The authority of the United States' courts to grant the writ is restricted by the act giving the power to cases where the prisoner is confined under or by colour of the authority of the United States or is necessary to be brought in to testify;‡‡ it extends to inquiry into the cause of commitment of a person in custody under a commitment of the Circuit Court of the District of Columbia;§§ or any other United States' court.|||| It is said of this writ in *ex parte Tobias Watkins*,¶¶ "the Supreme Court will not grant a habeas corpus to a prisoner in confinement under conviction by the Circuit Court of the United States of the District of Columbia when it is alleged that the proceedings in that court were *coram non iudice*; the power of the Supreme Court to award writs of habeas corpus is conferred expressly on the

* *Ex parte Partington*, 13 Mee. & W. 679; per Lord Kenyon, *R. v. Suddis*, 1 East, 314; and see to the same point Sir Vicary Gibbs' arg. in *Burdett v. Abbott*, 14 East, 91.

† *R. v. Paty*, 2 Salk; and see the cases of the Canadian prisoners, 1 Per. & Dav. and 5 Mee. & Wels.

‡ *Ex parte Lawrence*, 5 Binn. 304; see *Comth. ex rel. Crispin v. Jones*, 3 S. & R. 167.

§ Per Marshall, C. J. *Burr's Trial*, App. 2d pt. 185-6.

|| *Ex parte Burford*, 3 Cranch, 448; *ex parte Bollman*, 4 Cranch, 75; *ex parte Kearney*, 7 Wheat. 38.

¶ 3 Dall. 17.

** 3 Cranch, 448; 4 Cranch, 101.

†† *Ex parte Wilburn*, 9 Peters, 704.

‡‡ *Ex parte Cabrera*, 1 Wash. C. C. Reps. 232; *U. S. v. French*, 1 Gall. C. C. Reps. 2; *ex parte Dorr*, 3 Howard, 105.

§§ *Ex parte Bollman*, 4 Cranch, 75.

|||| *Ex parte Kearney*, 7 Wheat. 38.

¶¶ 3 Peters, 201.

quest by the fourteenth section of the judiciary act and has been repeatedly exercised; no doubt exists respecting the power; no law of the United States prescribes the cases in which the writ shall be issued nor the power of the court over the party brought up by it; the term is used in the Constitution as one which was well understood, and the judiciary act authorizes the Supreme Court and all the courts of the United States to issue the writ "for the purpose of inquiring into the cause of the commitment;" the writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause; it is in the nature of a writ of error to examine the legality of the commitment; it brings up the prisoner with the cause of his confinement and the court can undoubtedly inquire into the sufficiency of that cause; but if that cause be the judgment of a court of competent jurisdiction, especially a judgment withdrawn by law from the revision of the Supreme Court, it is conclusive and they will not inquire into it." The writ does not lie to bring up a person confined in the prison bounds upon a *capias ad satisfaciendum* issued in a civil suit.* The Supreme Court will not grant a habeas corpus when the party has been committed for contempt by a court of the United States of competent jurisdiction; and if granted the court will not inquire into the sufficiency of the cause of the commitment; the adjudication of the court below is a conviction, and the commitment in consequence is an execution and the exercise of the power of revising the case on a habeas corpus would be the exercise of an appellate jurisdiction in criminal cases, which is an authority not granted by the laws of the United States except by a certificate that the opinions of the judges are opposed, and the court will not do indirectly what they cannot do directly.† Upon a habeas corpus the court are only to inquire whether the warrant of commitment with the evidence returned states a sufficient probable cause to believe that the person charged has committed the offence stated;‡ if the court go into an examination of the evidence upon which the commitment was grounded it is unimportant whether the commitment be regular in point of form or not, they will proceed to do what the court below ought to have done.§ On a return to a habeas corpus before the Circuit Court the prisoner was discharged on the ground that the writ of *capias* by which he was detained had improperly issued, but there appearing to the court upon the hearing a sufficient ground for his arrest, he was ordered into custody upon a bench warrant;|| an application to the Supreme Court for a habeas corpus to discharge from this latter custody was refused.¶ A discharge on habeas corpus discharges the party only from such process under the same indictment,** or a new one.†† Neither the Supreme Court nor any other court of the United States or judge thereof can issue a habeas corpus to bring up a prisoner who is in custody under sentence or execution of a State court under criminal or civil process, for any other purpose than to be used as a witness.‡‡

The line of jurisdiction upon habeas corpus between the United States and the State courts, under what circumstances and how far judges of a State court have power to issue a habeas corpus and decide as to the validity of a commitment or detainer under authority of the United States, seems to have been variously determined in the different States.§§

* Ex parte Wilson, 6 Cranch, 59; Baldwin, J. in *Holmes v. Jennison & als.* App. to 14 Peters, 622; see ex parte Randolph, 3 Brock, C. C. Reps. 447.

† Ex parte Kearney, 7 Wheat. 38.

‡ U. S. v. John, 4 Dall. 412; S. C. 1 W. C. G. Reps. 363.

§ Ex parte Bollman & Swartwout, 4 Cranch, 114.

|| But see the discharge in Bollman and Swartwout's case, where it seems to be said by the Chief Justice that the evidence showed probable cause for some commitment.

¶ Ex parte Milburn, 9 Peters, 704.

** 9 Peters, 710.

†† 4 Cranch, 136.

‡‡ Ex parte Dorr, 3 Howard, 105.

§§ For the cases &c. on this subject, see Sergeant's Constitutional Law, p. 275 and sequel; Tucker's edition of Blackstone, pt. I. Vol. I. note D. p. 291-2.

As to the exercise of the writ of habeas corpus in the various States of the Union Chancellor Kent says,* "The statute 34 Charles II. has been re-enacted or adopted, if not in terms, yet in substance and effect in all the United States. The privilege of this writ is also made an express constitutional right at all times, except in cases of invasion or rebellion, by the Constitution of the United States and by the Constitutions of most of the States in the Union. The citizens are declared in some of these Constitutions to be entitled to enjoy the privileges of this writ in the most 'free, easy, cheap, expeditious and ample manner' and the right is equally perfect in those States where such a declaration is wanting. The right of deliverance from all unlawful imprisonment, to the full extent of the remedy, provided by the habeas corpus act, is a common law right; and it is undoubtedly true that the common law of England, so far as it was applicable to our circumstances, was brought over by our ancestors upon their emigration to this country."

The habeas corpus statutes of the States, which generally taken from the English law, are more or less varied from its exact provisions according to the date of their enactment, comprehend in most of the States the additions to the statute of Charles II. contained in the statute of 56 George III. There is however an engrafment upon its use as we derived this writ from the English law which seems to have grown into strength in America in some of the States by judicial decision and in others by express statutory enactment, viz. the hearing the whole merits and facts of the case upon habeas corpus, *deciding* upon the guilt or rather upon the innocence of the prisoner and absolutely discharging him without the intervention of a jury where the court is of opinion that the *facts* do not sustain the criminal charge.†

The *Massachusetts* statute provides sect. 21, "The party imprisoned or restrained may deny any of the facts set forth in the return or statement and may allege any other facts, that may be material in the case; and the court or judge shall proceed in a summary way to examine the cause of the imprisonment or restraint and to hear the evidence that may be produced by any person interested or authorized to appear both in support of such imprisonment or restraint and against it and thereupon to dispose of the party as law and justice shall require."

The *Alabama* statute beside a provision similar to that last quoted, provides in a further section "for issuing subpoenas and procuring the attendance of witnesses on return of the writ" and seems to contemplate a formal hearing of the merits.

The *Virginia* statute, 1818, provides sect. 5, "That the judge shall proceed to inquire into the cause of the imprisonment and shall discharge, bail or remand the prisoner." Sect. 6, "The return made shall not be conclusive as to the facts stated therein, but it shall be competent for the judge or court before whom such return is made to receive evidence in contradiction thereof and to determine the same as the very truth of the case shall require." It is the duty of the committing magistrate enforced by a heavy penalty, in every case, whether the prisoner be bailed or committed forthwith to issue a warrant directed to the sheriff of the county or the sergeant of the corporation, reciting the commitment and the charge against the prisoner and that "it appearing to the justice that the felonious offence wherewith the prisoner stands charged ought to be further enquired into by the county court, the sheriff is commanded to summon, at least eight of the justices of his county," to meet at the court house on some day named, which day must be not less than five, nor more than ten days from the date of the warrant, "then and there to hold a court for the examination of the fact with which the prisoner stands charged." Any five or more justices of the county, whether of those summoned or others may constitute this *called court* or as it is sometimes termed *examining court*. When the justices thus meet, the prisoner is brought to the bar and the case heard and argued upon the law and the facts. This being a court of record it is attended by the sheriff and clerk and all its proceedings

* 2 Comma. 27.

† See Mr. Vaax's essay upon the writ of habeas corpus, Philadelphia, 1846.

enrolled in the order book of the county court. As this court is a creature of the statute, all its functions and authority are derived from the warrant by which it is summoned; the first step is therefore to ascertain if there be a proper warrant. If that be defective the court on motion will quash; the court is then dissolved, the prisoner entitled to be discharged and the proceeding at an end. But a new warrant may be at once issued by any one of the justices and a judgment quashing the former warrant is no bar to any subsequent proceeding. If the warrant be a good one, the court proceeds to hear the testimony for and against the prisoner; and is governed by the same rules of evidence which control the admission of testimony to a jury. The testimony is given by the witnesses *viva voce* in open court, the clerk of the court taking down a synopsis thereof. The cause is then argued upon the law and the facts and the judgment of the court is pronounced. If they think that the prisoner should be tried, the judgment is entered "It is the opinion of the court that the prisoner ought to be further tried in the circuit superior court of law and chancery for this county for the offence where-with he stands charged; therefore it is considered that he be sent on to the next term of the said court to be then and there tried for the said offence." The clerk of the county court then transmits to the clerk of the superior court a copy of the warrant and record of the proceedings and also delivers to the attorney of the commonwealth in the superior court the aforesaid synopsis of the evidence to enable him to frame an indictment. This *called court* may admit or refuse to bail and fix the amount thereof in all cases at their discretion. If they are satisfied upon this hearing of the prisoner's innocence of the offence charged, the entry of their judgment is, "the witnesses being heard and all circumstances duly weighed, it is considered by the court that the prisoner be discharged." This discharge *on the merits* is a final acquittal and may be pleaded in bar of a subsequent prosecution. If a prisoner has not been examined before a *called court*, he may in the superior court plead that fact in abatement of the indictment; and any *material variance* in the charge laid in the indictment from that contained in the record of the called court will be fatal if pleaded.

The *New Jersey* act, 1795, and the *Kentucky* act, 1796, do not seem to have provisions in this respect different from the statute 31 Charles II. which they closely follow. The *Pennsylvania* act, 1785, after following in its first section the provisions of 31 Charles II. adds, "and that the said judge or justice" granting the writ "may according to the intent and meaning of this act be enabled by investigating the truth of the circumstances of the case to determine whether according to law the said prisoner ought to be bailed, remanded or discharged, the return may before or after it is filed by leave of the judge or justice be amended and also suggestions made against it, so that thereby material facts may be ascertained." It has been held under this act, in the court of common pleas of Philadelphia,* that the hearing upon habeas corpus is to be a re-hearing of the evidence by parol which was produced by the Commonwealth before the magistrate who committed the prisoner; and in the case then before the court the prisoner was discharged for want of evidence of his guilt, although one of the witnesses who had testified against him before the committing magistrate declined and was excused from giving his evidence to the court.

It does not seem to have been at any time contemplated by the common law that a superior tribunal should have the power upon habeas corpus to discharge upon an investigation into the guilt or innocence of the accused, from the commitments of an inferior tribunal authorized by law to commit, where such detention was definite in its term and only to answer by the common law process of trial by jury. To this the old law is clear; the only enquiry upon the return under magna charta from which the writ derived its efficacy was whether the commitment was *per legem terre*, that is by an officer authorized by the law of the land, for an offence against the law and for a purpose and in a form recognized by the law. That no discharge from trial was the purpose of this, is strongly shown by the action upon the co-ordinate writ *de odio et atia*, which was granted by

* Commonwealth v. Ridgway, 2 Ashmead's Reps. 247.

the law in favor of liberty and to prevent tedious and unjust imprisonment whilst the man committed *per legem terræ* for an offence not bailable, was awaiting his trial: This writ of enquiry was granted upon a presumption of the prisoner's innocence; so much so, that if he were indicted or appealed of the crime before the justices in Eyre, he could not have the writ de odio et atia, because the record then too strongly contradicted such presumption: and although upon this writ of inquest it was found that the prisoner was accused de odio et atia and that he was *not guilty*, yet could he *not be discharged*, but only bailed by twelve-manu-captors. So certainly did a commitment *per legem terræ* require a trial *per pares* to discharge from it. No power of discharging a prisoner in any case, is given by the habeas corpus act 31 Car. 2; except by the seventh section, where after having prayed a trial, he shall not have been indicted and tried by the second term of the court after his commitment; all the other provisions of the statute are only for the more readily *bailing* of the prisoner; the preamble of the statute recites as the grievance to be remedied "the long detaining in prison" of persons who by the law are *bailable*. The last section of this statute is conclusive as to what the law and practice in this respect were, in cases of commitments for "criminal or supposed criminal matter" at that time; it enacts "that the statute shall not extend to cases of suspicion of felony, which are bailable offences or not, according to the strength of the suspicion, because the facts are best known to the justices of the peace that committed and have the examination before them." It appears from the opinions of the judges in 1758, before quoted, particularly that of Sir Michael Foster, that the cases where the truth of the return and the facts its basis, were not considered conclusive were held in practice exceptions to the rule, not at all affecting commitments for trial, as to which the rule was unshaken as ever. The statute 56 Geo. III. ch. 100, whereby the truth of returns may be enquired into excludes from its provisions "cases of confinement or restraint for criminal or supposed criminal matter."

The statute 7 Geo. IV. ch. 64, sect. 2, provides that "two justices of the peace before they shall admit to bail and the justice or justices before they shall commit to prison any person arrested for felony or on suspicion of felony shall take the examination of such person and the information upon oath of those who shall know the facts and circumstances of the case and shall put the same or as much thereof as shall be material into writing."

Section 3 provides "every justice of the peace before whom any person shall be taken on a charge of misdemeanor or suspicion thereof shall take the examination of the person charged and the information upon oath of those who shall know the facts and circumstances of the case and shall put the same or so much thereof as shall be material into writing before he shall commit to prison or require bail from the person so charged."* It is said in Burn's Justice edit. 1845 vol. 3 p. 433 "at the same time" with the return of the body upon habeas corpus "the magistrate in obedience to a *certiorari* usually issued from the crown office with the habeas corpus returns the *depositions* upon which the commitment was founded in order that the court may be furnished with the means of judging in what way they should dispose of the prisoner."

* For the proceedings in examinations for commitment see 2 Burn's Justice 463. The statute 1 & 2 P. & M. chap. 13 was not to facilitate or enable the bailing of prisoners by a higher court, but as its preamble and first sections show to prevent their being bailed by justices of the peace improperly and in cases where the law did not sanction it.

CHAPTER XVIII.

CONCERNING WARRANTS TO SEARCH FOR STOLEN GOODS, AND SEIZING OF THEM.

I THOUGHT fit to insert this business in this place.[1] 1. Because it is a business preparatory to the discovery of felons, and preparing evidence against them, and to the helping of persons robbed to their goods. 2. Because it is found by experience of great use and necessity, especially in these times, where felonies and robberies are so frequent. And therefore this means of discovering them is now grown common and usual; much more than in antient times; and if it should be disused or discontinued, it would be of public inconvenience; and therefore I can by no means subscribe to that opinion of my lord *Coke's*, 4 *Instit. cap.* 31. *p.* 176. as it is there generally set down, "That justices of peace have no power upon a bare surmise to break open any man's house to search for a felon or stolen goods either in the day or night." (c)

The moderation and temperaments that are to be added to these warrants, are these:

[I. Touching the granting thereof.]

(c) *Vide supra*, *p.* 79, & 107.

[1] The fourth article of the amendments to the *Constitution of the United States* provides that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

There is provision to the same effect in the bills of rights of most of the State constitutions.

The act of Congress of 1799, *sess.* 3, *ch.* 23, § 68 provides "that every collector, naval officer, and surveyor or other person specially appointed by either of them for that purpose, shall have full power and authority to enter any ship or vessel in which they shall have reason to suspect any goods, wares or merchandize subject to duty are concealed and therein to search for and secure any such goods, wares or merchandize; and if they shall have cause to suspect a concealment thereof in any particular dwelling-house, store, building or other place, they or either of them shall upon proper application on oath to any justice of the peace be entitled to a warrant to enter such house, store or other place (in the day time only) and there to search for such goods, and if any shall be found to seize and secure the same for trial." &c.

These warrants must describe the persons whose houses are to be entered and the goods which are the object of search. *Sandford v. Nichols*, 13 *Mass. Reps.* 286.

1. They are not to be granted without oath made before the justice of a felony committed,[2] and that the party complaining hath probable cause to suspect they are in such a house or place, and do shew his reasons of such suspicion.

And therefore I do take it, that a general warrant to search in all suspected places is not good, but only to search in such particular places, where the party assigns before the justice his suspicion and the probable cause thereof, for these warrants are judicial acts, and must be granted upon examination of the fact.[3]

And therefore I take those general warrants dormant, which are made many times before any felony committed, are not justifiable, for it makes the party to be in effect the judge; and therefore searches made by pretense of such general warrants give no more power to the officer or party, than what they may do by law without them.

2. It is fit that such warrants to search do express, that search be made in the day-time, and tho I will not say they are unlawful without such restriction,[4] yet they are very inconvenient without it, for many times, under pretense of searches made in the night, robberies and burglaries have been committed, (*) and at best it creates great disturbance.

3. They ought to be directed to constables and other public officers, whereof the law takes notice, and not to private persons, tho it is fit the party complaining should be present and assistant, because he knows his goods.

(*) *Vide Part I. p. 553. Co. P. C. p. 64. Kel. 43.*

[2] A positive oath that a felony is *actually committed* is not necessary to justify a magistrate in granting this warrant. *Elce v. Smith*, 1 D. & R. 97. and *per Abbott, C. J.* "There are many cases in which a cautious man might not choose to swear that his property is stolen and nevertheless he might have great reason to suspect a particular party, and the magistrate would be well warranted in granting his search warrant. Suppose the case of a horse which has been lost by its owner and is found in the possession of another person, the owner in that case might not like to take upon himself to swear that the horse has been stolen, for it might have strayed, but when he finds his horse concealed in the stable of another person he may very naturally conclude it must have been stolen from the circumstance of the concealment, and therefore he may very conscientiously swear he suspects it to have been stolen. If under such circumstances the magistrate is not authorized in issuing his search warrant, it might happen in many cases that felonies would go unprotected."

[3] The warrant need not lay the property of the goods to be searched for in any particular person. *Bell v. Clapp*, 10 Johns. 263.

[4] In cases not of probable suspicion only but of positive proof, it is right to execute the warrant in the *night-time*, lest the offenders and goods also be gone before morning. 5 Burn, 841. *edit.* 1845.

4. It ought to command, that the goods found,[5] together with the party in whose custody they are found, be brought before some justice of the peace, to the end that upon further examination of the fact the goods and party, in whose custody they are found, may be disposed, as to law shall appertain.

And the reason is, tho the receiving of stolen goods doth not *ipso facto* make a man an accessory to felony, tho [151] he know them to be stolen,(†) yet he carries with it a great presumption, that the receiving of them was to aid the felon; and besides, by the examination of the receiver evidence may be gotten to discover the felon.

II. Touching the execution of this warrant.

1. Whether the stolen goods are in the suspected house or not, the officer and his assistants in the day-time may enter *per oetia aperta* to make search, and it is justifiable by this warrant.

2. If the door be shut, and upon demand it be refused to be opened by them within, if the stolen goods be in the house, the officer may break open the door,[6] and neither the officer nor the party that comes in his assistance are punishable for it, but may justify it upon the general issue by the statute of 7 Jac. cap. 5. so that *in eventu* it is justifiable by both, for it is a process for the king, and includes a *non omittas*, and the very having of the goods carries a sufficient ground *prima facie* of suspicion, that he was the felon that stole them, and may be thereupon justifiably arrested.

3. If the goods be not in the house, yet it seems the officer is excused that breaks open the door to search, because he searcheth by warrant, and could not know whether the goods were there till search made; but it seems the party that made the suggestion is punishable in such case, for as to him the breaking of the door is *in eventu* lawful or unlawful, *viz.* lawful, if the goods are there; unlawful, if not there.

III. Now upon the return of this warrant executed, the justice, before whom it is returned, hath these things to do :

(†) But now by 3 & 4 W. & M. cap. 9. & 5 Ann. cap. 31. whoever knowingly buys or receives stolen goods shall be taken as accessory to the felon. *Vide Part I. p. 620.*

[5] Where, a constable having a warrant to search for specific articles alleged to have been stolen, found and took away those and certain others supposed to have been also stolen, but which were not mentioned in the warrant and not likely to be of use in substantiating the charge of stealing the goods that were specified, it was held that the constable was a trespasser. *Crosier v. Cundey*, 9 D. & R. 224; S. C. 6 B. & C. 232.

[6] *Bell v. Clapp*, 10 Johns. Reps. 263; *State v. Smith*, 1 New Hamp. Reps. 346.

1. As touching the goods brought before him, if it appears they were not stolen, they are to be restored to the possessor; if it appears they were stolen, they are not to be delivered to the proprietor, but deposited in the hand of the sheriff or constable, to the end the party robbed may proceed by indicting and convicting the offender to have restitution.

2. As touching the party, that had the custody of the goods.

If they were not stolen then he is to be discharged.

If stolen, but not by him, but by another that sold or delivered them to him, if it appears that he was ignorant that they were stolen, he may be discharged as an offender, [152] and bound over to give evidence as a witness against him that sold them; if it appears he was knowing they were stolen, it is fit to bind him over to answer the felony, for there is a probable cause of suspicion, at least that he was accessory *after*.

CHAPTER XIX.

CONCERNING PRESENTMENTS, INQUISITIONS, AND INDICTMENTS, AND THEIR KINDS.

I HAVE gone through those matters, that are preparatory to the proceeding against malefactors in the several courts, wherein their offenses are punishable, namely, the arrest and imprisonment, or bailing of offenders, and the several jurisdictions, and justices, and ministers of justice concerned therein.

That which follows to be considered is the manner of bringing the offender to his legal trial and judgment, which is either by appeal, which is the suit of the party, or by indictment which is immediately the king's suit.

The former of these, namely appeals, I shall consider after the business of indictments, because it is but rare to have an appeal, and the most prosecutions of this nature are by indictment or presentment, and therefore I shall consider this first.

I shall distribute this matter into these general heads, namely, 1. Touching indictments and presentments. 2. Process. 3. Arraignment. 4. Pleas of the offender. 5. Trial. 6. Judgment. 7. Execution. Each of which will take in several particular heads and distributions.

Presentment is a more comprehensive term than *indictment*, for regularly an indictment is an accusation given in against a person by the grand inquest for some misdemeanor whereunto he is put to answer; but presentments do not only

include such indictments, but also some other informations whereunto the party is not put to answer, as presentments of *felo de se*, of *fugam fecit*, of deodands, of deaths *per infortunium*, and many others.[1]

In this title concerning presentments and indictments I shall consider these points. 1. The several kinds of presentments and indictments. 2. Where a man shall be put to answer in criminals without indictment. 3. Who may be indictors, and how returned. 4. Of what they may inquire. 5. What the penalty of not inquiring or presenting. 6. What formalities are required in indictments.

First, Touching the several kinds of presentments, inquisitions and indictments in matters capital:

They may be distinguished, 1. In relation to the courts or judicatories, or jurisdictions, where they are made.

And, 2. In respect of their effects or natures.

I. Touching the former branch of distribution in relation to the jurisdictions where made, and *that* multiplies presentments or indictments according to the jurisdictions, as some are in the leet, some in the sheriff's *Turn*,[2] some before the coroner, some before justices of peace, justices of *oyer* and *terminer*, gaol-delivery, king's bench, whereof enough before hath been said, and shall not need here to be repeated.

But those, that most concern capital offenses, are such as are taken before the coroner, or such as are taken before justices by commission, whereof more shall be said in the ensuing chapters.

II. As to the second kind of distribution in respect of the nature and effect thereof.

1. Some presentments are of themselves convictions, and not traversable.[3]

[1] I take a *presentment* to be, a mere denunciation of the jurors themselves, or of some other officer, without any other information: and an *indictment* to be, the verdict of the jurors, grounded upon the accusation of a third person: so that a *presentment*, is but a declaration of the jurors (or officers) without any bill offered before: and an indictment is their finding of a bill of accusation to be true. *Lambard Eiren. b. 4. ch. 5; see 2 Inst. 739.*

[2] The bishop and sheriff used twice a year to go a circuit, within a month after Easter and a month after Michaelmas; and held the great court called the *turn* in every hundred in the county. This was the grand criminal court in which all offences, both ecclesiastical and criminal were tried. The sheriff presided in criminal, the bishop in ecclesiastical causes. Two inferior criminal courts, were the *hundred* court, over which presided some bailiff; and the *leet* court over which presided the lord of the manor's steward. Over all these was the *wittenagemote*, composed of the great officers of state and presided over by the king; having jurisdiction appellate and original, both criminal and civil, when either great offences or great persons were concerned. See *Reeves' Hist. of English Law, Vol. 1. p. 6.*

[3] See *ante*, p. 60.

2. Others are not convictions, but only in nature of informations, and therefore traversable.

Regularly all presentments or indictments before justices of the peace, *oyer* and *terminer*, gaol-delivery, &c. are traversable, and conclude not the party or those claiming under him.

And therefore, tho it hath been held, that the presentment of a *felo de se* before the coroner be not tra- [154]
versable, (*de quo supra*,) yet of all hands it is agreed, that a presentment of a *felo de se* before justices of peace or *oyer* and *terminer* is traversable by the executors, &c. *Co. P. C. cap. 8. p. 55. H. 37 Eliz. B. R. Laughton's case.*

If a presentment be made *super visum corporis*, that *A. kild B.* and fled, this presentment of the flight is held not traversable, but conclusive to forfeit the goods, tho he be after acquitted of the felony, and expressly found by the petty jury upon his trial, that *non se retraxit*, (d) 13 H. 4. 13. b. *Forfeiture* 32. 3 E. 3. *Forfeiture* 35. 7 Eliz. Dy. 238. b. And the same law is, if it be found *super visum corporis*, that the felon fled and was kild in the flight, this presentment, tho after the party's death, is conclusive as to the forfeiture for the flight. 3 E. 3. *Coron.* 289, 290. 312.

But if before justices assigned to hear and determine, it be presented, that *J. S.* committed a felony and fled; or if upon the arraignment of a person for felony he be found not guilty, and that he fled, this is but in nature of an inquest of office, and the flight is traversable in an action, or information, or *scire facias* brought by the king for the goods of the person; 37 Assiz. 7. 47 E. 3. 26. a. And all the reason, that can be given why the coroner's inquest of a *fugam fecit* is conclusive, and not the other, is only that which is given 8 E. 4. 4. a. *Ceo est un ancient possitif ley del coron.*

If a man be presented to have suffered an escape, because in this case the party is at least to be fined, he shall have his traverse to it, and is not concluded by it.

But if either before the justices in *eyre*, or before the coroner, an escape be presented upon a vill either before or after the arrest, this is held not to be traversable, because there is only an amercement to be set upon the vill, viz. *villata in misericordia*; and the reason given by *Stamford* is, *quia de minimis non curat lex*; *Stamf. P. C. Lib. 1. cap. 32. f. 35. b.*

But if it fall out, that there be an indictment for such an escape, (as there hath been formerly against the city of *London* for the escape of those that riotously kild [155]
Dr. Lamb, (e) who were thereupon fined 2000*l.*) such an indictment is not conclusive, but traversable.

(d) *Vide supra*, p. 63, 64.

(e) *Cra. Cer.* 252.

Whether an inquisition of a *felo de se* before the coroner be traversable, *vide quæ supra*, Part I. cap. 31. p. 414.

And there are no presentments besides what are before-mentioned, that are in themselves convictions and not traversable, but a presentment in a leet of bloodshed or the like, and in the *Swanimote* court of the forest, for offenses of *Vert* and *Venison*.

But even those presentments are traversable also in two cases, viz. 1. If the offense presented be out of their jurisdiction. 2. Or if the presentments be such as concerns the freehold, as presentments of nuisances, or such matters as charge the freehold; 41 E. 3. 26. b. 45 E. 3. 8. b.

And therefore it was resolved in the *Exchequer* in a *quo warranto* against the water-bailiff and conservator of the river *Severn*, 22 Car. 2. that upon a bare presentment the conservators cannot set a fine upon a supposed unlawful fishing or the like, unless the party comes *in* and confesses it, or pleads to it, and be convicted by a jury of the offense.

A presentment of a riot or forcible detainer by a justice or two justices of peace, as the case shall require, is a conviction by the statute of 15 R. 2. cap. 2. 8 H. 6. cap. 9. 13 H. 4. cap. 7.

But a presentment by a justice of a default in repairs of an highway, tho by the statute of 5 Eliz. cap. 13. it is such a presentment as the parties shall be put to answer, yet it is not conclusive, but the traverse of the party is saved by the statute; and it is but reason, for tho the view of the justice can ascertain the decay or want of repairs, yet it cannot ascertain in what parish it lies, or who is bound by tenure or prescription to repair.

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CHAPTER XX.

WHERE A MAN SHALL BE PUT TO ANSWER IN CRIMINAL AND CAPITAL OFFENSES WITHOUT INDICTMENT AT THE KING'S SUIT.

At the common law there were several means of putting the party to answer a felony without any indictment, some whereof are still in force, others are taken away by statute.

I. If a thief or robber were taken with the *mainouvre*, *cum manu opere*, and the *mainouvre* brought into court with the prisoner, he should have been arraigned upon the *mainouvre*

at the king's suit; 2 *E. 3. Coron.* 156. And therefore *M. 18 & 19 E. 1. coram rege, rot. 28. Norf. Et quia prædictus Johannes de Brampton [falsarius sigilli regis & brevium suorum, ut dicitur,] non est appellatus, nec indictatus, nec captus cum manu opere, per quod secta domino regi in hujusmodi casu potest competere, ided [consideratum est, quodd] prædictus Johannes [eat inde] sine die, &c.*

And *T. 10 E. 2. rot. 132. Bucks, Robert Legat* was arraigned for counterfeiting the king's seal, upon the counterfeit commission brought into court without indictment, and he pleaded not guilty, and was acquit. (*)

But upon a bare information or bill, [1] without indictment or the *mainouvre* at common law, no party was to be put to answer for a felony; and therefore, *M. 20 & 21 E. 1. coram rege, rot. 27. Hibernia, William Prene*, the king's carpenter in *Ireland*, being accused for felony by a bill in the king's-bench there, and convicted and condemned, but after ransomed for 200*l.* and a writ of error brought in the king's-bench in *England*, and assigned, that he ought not to be put to answer in case of life or member *per vocem & per billam, quam* Nigellus le Broun, *porrexit versus ipsum, licet non [149*] esset indictatus per 12. (f)*

(*) *Vide Part I. p. 186 & 349.*

(f) That case was thus: *William Prene* assigned for error that "par ceo que le commune laie de *Engleterre*, e de *Ireland*, veut, ke nul homme par bille sanz enditement, ou par sute de apel, suz les plez de corone, ne sait [soit] attache, ne mis en respounz; yet that he the said *William* had been imprisond, & de diversis felonis acculpatus par une bille par *Nel le Broun* bote en mayns des justices; altho par enquest, ne par chapiter, ne fut endite." And upon consideration of the whole matter the court of king's-bench in *England* were of opinion, "Quod prædictum recordum est irritandum, & adnichilandum; & ideo mandatum est capitali justic' *Hibernie*, quod corrigat, &c. & accepta securitate de prædicto *Willielmo* ad standum recto in com' ubi deliquisse debuit, & vocatis super hoc convocandis ponat prædictum *Willielmum* per apertum & manifestum indictmentum de certis felonis in certis locis, si aliquis vel aliqui eum fortè indictare sive appellare voluerit secundum legem et consuetudinem regni, &c. & quodd interim per manucaptionem bona & catella, terras & tenementa, eidem *Willielmo* delibaret, &c.

[1] See the argument intended for the court, in *Earbery's case*, (20 *Cobbett's State Trials*, p. 856,) as to the entire illegality of informations. Sir Francis Warrington is there quoted for saying "that he remembered very well, Lord Chief Justice Hale often said, that if ever informations came into dispute, they could not stand, but must necessarily fall to the ground." Their legality, when filed by the Solicitor General, was questioned in the first error assigned on the Writ of Error in *Wilks' case*.

By amendment to the Constitution of the United States, proposed at the first session of the first Congress and after adopted, it was provided that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

But it seems to me, that this proceeding upon the *mainouvre* is wholly taken away by the statutes of 25 E. 3. cap. 4. 28 E. 3. cap. 3. 42 E. 3. cap. 3. and therefore I do not find any proceeding upon the *mainouvre* since these statutes.

II. A second sort of proceeding in cases capital without indictment is, where an appeal is brought at the suit of the party, and the plaintiff is nonsuit upon that appeal, yet the offender shall be arraigned at the king's suit upon such appeal; and so it is in case the appellant die or release; and in such case, altho the party be indicted as well as appealed, yet upon the nonsuit of the plaintiff, the proceeding for the king shall not be upon the indictment, but upon the appeal. 4 E. 4. 10. a.

But this hath these two qualifications.

1. It must be where the plaintiff in the appeal hath either declared upon his appeal by writ, or formed his appeal by bill, for the bare suing of a writ without a declaration is not such an appeal as, the party being nonsuit, the defendant shall be thereupon arraigned; for 1. The writ may be brought in his name by a stranger without his privity. 2. Because the writ alone contains not such certainty of time, place, and other matters, whereby the party may be put to answer. 7 H. 7. 6. h.

2. It must be where an appeal is well begun, and by a party enabled to prosecute it, therefore, if the appeal abates, because a plaintiff is outlawed, or a woman (who cannot bring an appeal, but only of the death of her husband,) or if the year and day be past, or by the misnomer of the defendant, [150*] &c. there the appellee shall not be arraigned at the king's suit, because the appeal was never good, but shall be dismissed, only the judges may arraign him upon an indictment, if any be before them for that offense, or if none be, yet they may bind him over to another sessions, and in the mean time to be of good behaviour; 19 E. 2. Coron. 317. All the learning touching this business is fully declared by *Stamf. Lib. III. cap. 59. f. 147. & sequentibus.*

III. A third sort is upon an appeal by an approver, but the whole learning touching that will come in its proper place hereafter. (g)

IV. The fourth sort is by appeals by particular persons, especially of treason in parliament; and this was very frequent in antient times, especially in the time of R. 2. namely *anno septimo, undecimo & duodecimo*, which bred great inconveniencies.

And therefore by the statute of 1 H. 4. cap. 14. all these

kind of appeals in parliament are wholly taken away; and since that time I find not any such appeals brought in parliament.

And therefore, when the now earl of *Bristol*, in this present parliament, in the lords house preferred articles of high-treason and other misdemeanors against the earl of *Clarendon*, then lord chancellor, upon a reference unto all the judges, and upon great consideration the judges *unâ voce* returned their opinion, that these articles were contrary to the statute of 1 *H.* 4. and could not be preferred in the lords house by the said earl, or any other private person. (h)

But impeachments by the house of commons of high treason, or other misdemeanors in the lords house have been frequently in practice, notwithstanding the statute of 1 *H.* 4. and are neither within the words nor intent of that statute, for it is a presentment by the most solemn grand inquest of the whole kingdom.

V. If in a civil action *de uxore raptâ cum bonis viri*, upon not guilty pleaded, the defendant be convicted, this anciently served in nature of an indictment of felony, 13 *Assiz.* 6. 18 *E.* 3. 32. a. *Stamf. P. C. f.* 94. b. So if upon a special verdict in trespass brought in the king's-bench, it be [151*] found, that the defendant took them feloniously, anciently this served for an indictment. 31 *E.* 1. *Enditement* 31.

So if in an action of slander for calling a man thief, the defendant justifies that he stole goods, and issue thereupon taken, it be found for the defendant, if this be in the king's-bench, and for a felony in the same county where the court sits, or if it be before justices of assize, who have also a commission of gaol-delivery, he shall be forthwith arraigned upon this verdict as on an indictment, and the reason is, because here is a verdict of twelve men in these cases, and so the verdict, tho in a civil action, serves the king's suit as an indictment, and is not contrary to the acts of 25, 28, & 42 *E.* 3. which enact, *that no man shall be put to answer, &c. but upon indictment or presentment.*

But if the sheriff returns a rescue of a prisoner taken for felony, 1 *H.* 7. 6. a. or a breach of prison by one arrested for felony, 2 *E.* 3. 1. b. this is not sufficient to arraign the party, nor doth it countervail an indictment, for it is not by the oath of twelve men; *vide hoc totum, Stamf. P. C. Lib. II. cap. 29. f.* 95. a.

By the statute of 11 *H.* 7. cap. 3. there was power given to proceed upon all penal statutes by information before justices of assize and peace, but there is an exception of all cases of treason, murder and felony.

Ill use was made of this statute by *Empson* and *Dudley*, and great inconvenience and trouble to the people did arise by it, and therefore by 1 *H. 8. cap. 6.* it was repealed.

And tho informations are practised oftentimes in the crown-office in cases criminal, and by many penal statutes the prosecution upon them is by the acts themselves limited to be by *bill, plaint, information* or *indictment*, yet thus much is observable.

1. That the method of prosecution of *capital* offenses is still to be by indictment, except the cases above mentiond.

2. That in all criminal causes the most regular and safe way, and most consonant to the statutes of *Magna Carta, cap. 29. 5 E. 3. cap. 9. 25 E. 3. cap. 4. 28 E. 3. cap. 3. & 42 E. 3. cap. 3.* is by presentment or indictment of twelve sworn men.[2]

[2] The *Constitution* of the United States provides *Amendments art. 5.* "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces," &c.

The case of the *State v. Keyes*, 8 *Vermont Reps.* 57, construes this provision as extending only to offences cognizable in the courts of the United States.

There is a similar provision in many of the State Constitutions.

It is provided in the *Constitution of the United States art. 4, sect. 2.* "A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

The act of Congress of *February 12, 1793, Sess. 2, chap. 7,* provides *sect. 1.* That whenever the executive authority of any state in the Union or of either of the territories northwest or south of the river Ohio, shall demand any person as a fugitive from justice of the executive authority of any such state or territory to which such person shall have fled and shall moreover produce the copy of an *indictment found* or an *affidavit* made before a magistrate of any state or territory as aforesaid, charging the person so demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured and notice of the arrest to be given to the executive authority making such demand or to the agent of such authority appointed to receive the fugitive and to cause the fugitive to be delivered to such agent when he shall appear: but if no such agent shall appear within six months from the time of the arrest the prisoner may be discharged. And all costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the state or territory making such demand shall be paid by such state or territory.

Sect. 2. Any person interfering with such agent in transporting his prisoner from one State to the other to be subject to a fine of five hundred dollars and imprisonment not exceeding one year.

CHAPTER XXI.

WHO MAY BE INDICTORS, AND WHERE AND HOW RETURNED.

INQUISITIONS, presentments, or indictments are taken before courts, or officers of several kinds, and accordingly by acts of parliament several things are prescribed touching them.

I. Touching inquests before coroners: By the statute of 4 *E.* 1. *De officio coronatoris*, the coroner is to issue his precept to four, five or six vills to appear before him at a certain day to make inquiry, this precept is directed to the constables of the vills, who accordingly give summons to a competent number of inquirers, twelve at least,⁽ⁱ⁾ and by them the inquisition is made, when they have been sworn and have heard their evidence upon oath taken before the coroner.

II. Touching inquests of felonies in leets and *Turns*. By the statute of *Westminster* 2. *cap.* 13. indictments in the sheriffs *Turns* are to be by twelve at least, and they are to set their seals to the inquisitions, otherwise they are void.^(k)

And by the statute of 1 *E.* 3. *cap.* 17. which extends as well to leets as *Turns*, they are to be by indenture, one part to remain with the indictors, the other with the sheriff or steward.

And by the statute of 1 *R.* 3. *cap.* 4. no person shall be returned upon a pannel in the sheriff's *Turns*, unless he hath 20*s.* *per ann.* of freehold, or 26*s.* 8*d.* of copyhold, and all indictments in the *Turn* taken otherwise shall be void.

But now by the statute of 1 *E.* 4. *cap.* 2. the sheriff cannot proceed upon any indictments for felony, or otherwise taken in his *Turn*, but must send them to the sessions of the peace, and the justices there are to make process and proceed thereupon.

But then there must be care taken, 1. That the indictments be of such matters only, as are within the jurisdiction of the sheriff's *Turn*, otherwise the justices may [153*] not proceed upon them, 4 *E.* 4. 31 *a.* 8 *E.* 4. 5. *b.*^(*) and 2. That they be by indenture, and under the seals of the presenters, according to the former statutes.

III. Indictments taken in the county of *Lancaster* before the sheriff or justices against any person inhabiting out of the same county, or taken in any other county against inhabitants of the county of *Lancaster*, ought to be by twelve men, and

(i) *Cobat's case supra.* p. 161. *in notis.*

(*) *Vide supra.* p. 71.

(k) 2 *Co. Institut.* p. 387.

each indictor to have lands or tenements of the yearly value of 5*l.* by the statute of 33 *H. 6. cap. 2.*(†)

IV. Touching murders, &c. committed in the king's palace, the statute of 33 *H. 8. cap. 12.* hath appointed, that twenty-four of the king's yeomen officers of the cheque-roll of the king's house shall be returned to make inquiry, and the trial to be by a jury of the gentlemen officers.

V. Concerning inquiries to be made before justices itinerant, the course was this: There first went out the writ of the common summons of the *eyre*, directed to the sheriff to summon *de quolibet villâ quatuor homines & præpositum, & de quolibet burgo duodecim legales burgenses*, to be at the day and place for the *eyre*, and upon that day the sheriff and lords of liberties were to return the names of the bailiffs of their hundreds and liberties, and those bailiffs were sworn to elect two men in their several hundreds, and present their names to the court, and these two hundreders for each hundred were to choose of themselves, and the rest of their several hundreders respectively, ordinarily sixteen, or sometimes only twelve, who were severally sworn upon inquiries and presentments of things done within their hundred, as so many grand inquests for every several hundred, and the twelve returned for each borough were the grand inquest for the borough; this caused a vast and chargeable attendance upon the courts in *eyre*, and hath been long disused, and therefore I shall not say more of it.

VI. Concerning the choosing and returning of the grand jury before justices assigned to keep the peace, *oyer* and *terminer*, and gaol-delivery, I shall be somewhat more large; because, before these justices, ordinarily, criminal and capital causes are heard and determined.

Upon the summons of any session of the peace, [154*] there goes out a precept either in the name of the king, or of two or more justices of peace, directed to the sheriff, that non omittas propter aliquam libertatem in ballivâ tuâ, quin eam ingrediaris, & venire fac' tali die ac loco viginti quatuor liberos & legales homines[1] de quolibet hundredo in

(†) *Part I. p. 286.*

[1] Hawkins alleges the right of challenge to a grand juror by any one under prosecution for a crime before he is indicted. *Book 2, chap. 25, sect. 16.* This is denied to be law in Joy on "Challenges to Jurors" p. 122. In Sheridan's case 31 *How. St. Trials* 543 the court of King's Bench of Ireland after full discussion decided that a challenge could not be made to a grand juror; but objections to them must be pleaded. No authorities were cited beside Hawkins' opinion, and the cases he quotes; except an opinion of Lord Holt, holding as was decided in this case.

This right of challenge has been recognized in American cases. *Barr's trial*;

ballivâ tuâ, tam infra libertates, quàm extra, ad faciendum & exequendum ea quæ ex parte domini regis tunc & ibidem eis injungantur, and a seire fac' to all coroners, constables, and bailiffs, &c. to be there at that day. *Lamb. Lib. II. cap. 2.*

And according to others, Venire fac' viginti quatuor liberos & legales homines de quolibet hundredo in ballivâ tuâ, quorum quilibet habeat 40s. per ann. liberi tenementi ad minus, venire fac' etiam viginti quatuor tam milites quàm alios probos & legales homines de corpore com' tui, quorum quilibet habeat 40s. de terris & tenementis liberi tenementi, ad inquirend' super iis, quæ ex parte domini regis ad tunc & ibidem eis injungerentur, præmunientes, omnes justiciarios ad pacem, constabularios, &c. *Crompt. f. 212. a.*

And in cases of commissions of *oyer* and *terminer*, and gaol-delivery, Quod non omittas propter aliquam libertatem, quin eam ingrediaris, & venire fac' tam viginti quatuor probos & legales homines de quolibet hundredo, com' prædict', ad inquirendum, præsentandum, faciendum & exequendum ea omnia, quæ ex parte domini regis tunc & ibidem eis injungerentur, quàm alios viginti quatuor probos & legales homines de com' prædict' ad faciend' juratam inter dominum regum & prisiones prædictos, &c. *Co. Entr. f. 55. a.*

Upon this precept the sheriff is to return twenty-four or more out of the whole county, namely, a considerable number out of every hundred, out of which the grand inquest at the sessions of the peace, *oyer* and *terminer*, or gaol-delivery, are taken and sworn *ad inquirendum pro domino rege & corpore comitatus*, (not as antiently in *eyre*, a kind of grand inquest out of every hundred); but in some counties, which consist of gildable and such franchise, where antiently several justices of gaol-delivery sat, as in *Suffolk*,(*) there are two grand juries, one for the gildable, another for the franchise, because there are two several commissions of gaol-delivery.

Now touching the grand jury thus returned before [155*] justices assigned, there are some things considerable.

They must be *probi & legales homines*, and therefore if any of the indictors be outlawd, tho in a personal action, it is a suf-

(*) *Vide supra*, p. 26.

Comth. v. Smith 9 Mass. 107; *People v. Jewett* 3 Wend. 314; *Comth. v. Clark & Browne* (Penn.) 323; *Ross v. the State* 1 Blackf. 390; *Jones v. the State* 2 Blackf. 476. In this last case the Commonwealth was allowed to challenge, and the prisoner was called into court that he might have his challenges before the grand jury was sworn. See too 7 How. St. Trials 249, where a case is reported in which the crown officer is said to have challenged grand jurors.

In *New York* 2 R. & 724 sects. 27. 28 provides challenge to grand jurors.

ficient plea to avoid the indictment; 11 *H. 4.* 41 *b. M.* 4 *Car. B. R. Croke*, p. 134. Sir *William Withipole's* case, and the statute of 11 *H. 4. cap.* 9. hereafter mentioned fortifies this, *de quo infra*.

And therefore if any of them be attainted in a conspiracy, or *decies tantum*, or of perjury, or outlawd in any personal action, or attaind of felony, or in a *præmunire*, they are not to be indictors, because in law they are not *probi & legales. Lamb. Justic.* 391.

Touching their *annuus census*, I do not find any thing determined, but freeholders they ought to be. The statute of 2 *H. 5. cap.* 3. that requires jurors that pass upon the trial of a man's life, to have 40*s. per ann.* freehold, hath been the measure by which the freehold of grand jurymen hath been measured in precepts of summons of sessions.^(†)[2]

By the statute of 11 *H. 4. cap. ultimo*, reciting, that inquests had been formerly returned of persons outlawd, fled to sanctuary for treason or felony, &c. enacts, "That no indictments be made by such persons, but by inquest of loyal subjects returned by the sheriffs or bailiffs duly, without denomination of any person, but only by the sworn bailiffs and ministers of the sheriff; and if any indictment be otherwise taken, it be void."

Upon this statute it hath been resolved in Sir *William Withipole's* case, above cited. 1. That it extends to coroners inquests. 2. It is a good plea upon this statute, that one of the indictors is outlawd in a personal action, as well as of felony, or that any of the jurors were impannell'd at the denomination of any, contrary to this statute.[3]

By the statute of 3 *H. 8. cap.* 12. it is enacted, "That the

(†) *Vide infra*, p. 272. in *notis*.

[2] See 2 *Hawkins*, ch. 25, sects. 19 & 21.

In Easter Term 31st May 1810, at a meeting of all the judges they were of opinion that it was not required positively by law that the grand jury should be freeholders; and it appearing that it had not been the practice of London to return only freeholders, it was held that it was right to let it go on as it had thitherto. 1 *Russ. & Ryan*, 177.

In *Kirwan's* case 31 *How. St. Trials* 611 the King's Bench of Ireland held that a grand juror needs not to be a freeholder. See *Boyington v. The State*, 2 *Port.* 100; *State v. Williams*, 5 *Port.* 130. Now regulated by 6 *Geo. IV. chap.* 50.

[3] *Brooke's Abr. Indict.* 2; *Wm. Jones*, 98; 2 *Hawkins*, ch. 25; *Bac. Abr. Juries, A.*; *State v. Duncan*, 7 *Yerger*, 271; *Comth. v. Cherry*, 2 *Va. Cases*, 20; *Comth. v. St. Clair*, 1 *Grattan*, 556. See *State v. McEntire*, 2 *Car. Law Reps.* 287; where it was held that objections to grand jurors must be pleaded in abatement; and came too late after pleading to the indictment.

In *Comth. v. Smith*, 9 *Mass.* 107, it was held that objections to the sufficiency of grand jurors must be made before indictment found; and *People v. Jewett*, 3 *Wend.* 314. See this question fully discussed in *Boyington v. The State*, 2 *Porter*, 100.

justices of gaol-delivery, and justices of peace, whereof one of the *quorum*, in open sessions, may reform the pannels returned by the sheriff, (which be not at the suit of the parties,) by putting to, and taking out the names of the persons [156*] returned, and shall command the sheriff to return the same accordingly, upon pain of 20*l.* and the king's pardon to be no bar to the prosecutor." [4]

This act extends not only to pannels of grand inquests returned, but also to pannels of the petty jury, commonly called the jury of life and death, which may be reformed by the justices according to this act, and the sheriff is bound to return the pannel so reformed.

The grand inquest returned the first day of the sessions, and sworn, commonly serves the whole sessions of the peace, *oyer* and *terminer*, or gaol delivery; yet the court may command another grand inquest to be returned and sworn, which is done ordinarily upon two occasions. [5]

1. If before the end of the sessions, the grand jury having brought *in* all their bills, are discharged by the court, and after that discharge, either some new felony, or other misdemeanor is committed, and the party taken and brought into gaol; or if after the discharge of the grand inquest, some offender be taken and brought *in* during the sessions. In the former case, there is a necessity to make a special record of the adjournment of the sessions from day to day, because otherwise the whole sessions are in supposition of law only the first day, and therefore without the entry of such adjournment, the offense and proceedings will be, in supposition of law, after the sessions ended, and so the proceeding will be erroneous: (*) this was the case of *Sampson* (h), who being arraigned and tried for a murder committed after the first day of the sessions, and before the sessions ended, for want of entry of an adjournment it was ruled erroneous. And the same is to be observed, if upon record it appears, that the grand inquest was returned after the first day of the sessions, unless an adjournment be entered of record.

2. The second ordinary instance of a new grand jury returned, is upon the statute of 3 *H. 7. cap. 1.* namely, a grand

(*) *Supra*, p. 24.

(h) *W. Jones*, 420.

[4] *Y. B.* 41 *E.* 3. 26. The justices reformed the panel of jurors falsely returned by the sheriff.

[5] See 6 *Geo. IV. chap. 50, sect. 42.*

Where the grand jury had been discharged and left the court but had not left the building nor separated, the judges directed them to be sent for back into court and directed another bill of indictment (the witnesses on which were going abroad) to be sent before them. *R. v. Holloway*, 9 *C. & P.* 43.

inquest impannelled to inquire of the concealment of another grand inquest, upon which defaults presented, the former grand inquest is to be amerced; and this, tho it mentions *only* an inquest thus to be taken by justices of peace, yet it extends to the king's bench, and hath been practised there accordingly in my knowledge, and possibly at the sessions of *oyer and terminer* and gaol-delivery, tho that can rarely come in question, because the sessions of the peace ordinarily accompanies those commissions.

And this is the proper and legal way of punishing the grand inquest, if they refuse to present such things as are within their charge, and for which they have probable evidence to make a presentment; but of this more in the next chapter.[6]

[6] As to the subordination of the grand jury to the control of the court, it has been said in Connecticut that the grand jury are now a more independent body in their action than formerly considered. *State v. Fassit*, 16 *Connec.* 468; see *Scarlet's case*, *Reps.* pt. 12. p. 98; 3 *East*. 33.

In the *State v. Boyd*, 2 *Hill's S. Car. Reps.* 288, it is said that the court will in no instance inquire into the character of the testimony which has influenced the grand jury in finding an indictment.

In *R. v. Russell*, 1 *C. & M.* 247, it was held that where the grand jury have found a bill, the judges before whom the case comes to be tried ought not to inquire whether the witnesses were properly sworn previously to their going before the grand jury.

But in *Jetton v. The State*, *Meigs' Reps.* 192, such inquiry was made. And in *U. S. v. Coolidge*, 2 *Gallison*, 367, the bill of indictment was quashed, it being shown to the court by affidavits that one of the witnesses who had been before the grand jury had not been sworn; *sed vide*. See *Combs v. Crane*, 3 *Penns. Law Journ.* 450.

The names of the witnesses who are to support the bill of indictment should be endorsed on the back of the bill. The witnesses should afterwards be sworn in court by the crier at the assizes or the clerk of the peace at sessions, ready to go before the grand jury when required. 3 *Burn*, 901. There is no objection to the examination of witnesses at the trial, who were not sent before the grand jury; but in cases of felony, where the prosecutor does not think proper to examine any witness whose name appears on the back of the bill, the court will usually at the desire of the prisoner require such witness to be placed in the box as the witness of the crown, in order that the prisoner may have the benefit of questioning him in cross-examination. This is not the practice in misdemeanors, nor is it a right in felonies. *R. v. Vincent*, 9 *C. & P.* 91; see *R. v. Beesley*, 4 *C. & P.* 220.

In Massachusetts the grand jury usually return the names of all the witnesses examined by them, without specifying the bills; but in a leading case, where the prisoner's counsel requested that a list of the witnesses before the grand jury should be given, the court granted the application without doubt, it being remarked by Wilde, J. that such a request had never been refused. *Com. v. Knapp*, 9 *Pick.* 498.

In Pennsylvania the act of 1705 provides that no person or persons shall be obliged to answer to any indictment or presentment, unless the prosecutor's name be endorsed thereupon, 1 *Smith's Laws*, 56; and though it has been held by the Supreme Court that the act does not go so far as to require, that a prosecutor should be endorsed in cases where no prosecutor exists, *R. v. Lukens*, 1 *Dall.* 5; yet undoubtedly the spirit of the common law requires that the bill itself should afford the defendant the means of knowing who are the witnesses on whose evi-

dence the accusation against him is based. *Arch. C. P. by Jerol. 13; Barbour's Crim. Treat. 272.*

In Mississippi however it is not necessary that the grand jury should return with the indictment the names of the witnesses examined or the evidence. *King v. State, 5 Howard, 730.*

It is not the practice in the courts of the United States, it is said, that the name of the prosecutor should be written at the foot of the indictment. *U. S. v. Musdel, 6 Call, 245.*

In Virginia the rule is the contrary. *Haught v. Com. 2 Va. Cases, 3; Com. v. Dove, ib. 29.* It is not there essential, however, in an indictment for a trespass or misdemeanor, to insert the name of a prosecutor, if it appears that the indictment was found on the evidence of a witness sent to the grand jury, either at their request or by direction of the court; and that whether there was a previous presentment or not. *Worthington v. Com. 5 Rand. 669.*

In Kentucky it is held that the omission of the name of the prosecutor, his addition and residence, in cases of trespass is fatal. *Com. v. Gore, 3 Dana, 474; Bartlett v. Humphreys, Hardin. 513.*

By the ancient practice witnesses to be sent to the grand jury were previously sworn in open court. If a witness who is sent to the grand jury be thus sworn, though not in the immediate presence of the judge or in his temporary absence from the bench, it is good. *Jetton v. State, Meigs, 192.*

In Connecticut, witnesses before a grand jury according to settled and uniform practice are sworn by a magistrate in the grand jury room and not in court; and this is pronounced a lawful mode of administering the oath. *State v. Fessit, 16 Conn. 457.*

In the U. S. Circuit Court for the Eastern District of Pennsylvania, the practice was, it is said, to summon a justice of the peace as one of the grand jury and to permit him to swear the witnesses in the jury room, *7 Smith's Laws, 686;* but at present, the witnesses are sworn by the clerk. In many of the States, however, express power is given to the foreman to swear witnesses whose names are given to him for the prosecution. Such an authority is given in Massachusetts by the statute of 1807, c. 140; in New York by the revised statutes, part 2. tit. 4. c. 2. art. 1. sect. 29; and in Pennsylvania by the act of April 5, 1826. It will be observed that in the latter State, the authority is expressly limited to such witnesses 'whose names are marked by the attorney general on the bill of indictment,' and consequently all others must be sworn in open court." *Wharton's American Criminal Law, p. 123.*

Preparatory to the trial of the regicides, A. D. 1660, it was resolved by the court, *2 St. Trials, 302; Kelyng. 8,* that the king's counsel had a right to manage the evidence to the grand jury. See *8 How. St. Trials, 773,* where it is said in a note, that at the Old Bailey, January, 1796, the grand jury refused to allow the crown officer to be present during their deliberations. In the case of Col. Nicholas Bayard, who was tried at New York, February, 1702, under a special commission of oyer and terminer, the Solicitor General insisted on presenting the evidence to and continuing with the grand jury during their deliberations against their wish. But the case seems, as reported, to have been conducted with such indecent desire to convict on the part of the court as to prevent its being authority. *5 State Trials, 419.*

Sir John Hawles, in his remarks upon Colledge's trial, *4 St. Trials, 173,* says, "I know not how long the practice of admitting counsel to a grand jury hath been. I am sure it is a very unjustifiable and insufferable one. If the grand jury have a doubt in point of law they ought to have recourse to the court and that publicly, and not privately: and not rely on the private opinion of counsel, especially of the king's counsel, who at least behave themselves as if they were parties." It is not unusual, says Mr. Chitty, except in the King's Bench where the clerk of the grand juries attends them, to permit the prosecutor to be present during the sitting of the grand jury, to conduct the evidence on the part of the crown. *1 Crim. Law, 316.*

It has been held in New York that the District Attorney has no right to be

present with the grand jury unless so requested. 5 *Conn.*, 563; see *Davis' Precedents*, 21.

In Connecticut no counsel on the part of the State or of the prisoner are admitted to the grand jury; but the prisoner himself is allowed to be present and to cross-examine the witnesses. *Lang's case*, 1 *Connec.* 428; and see *The State v. Fassitt*, 16 *Connec.* 469.

In the Court of Quarter Sessions of Philadelphia, May Term, 1847, it was said in the charge to the grand jury, Kelley, J. presiding, that the Attorney General or his assistant had a right to be present with the grand jury during the examination of the witnesses for the Commonwealth.

The usual practice is for the foreman to sign the return, and the words "true bill" with his name attached has been frequently considered a good finding. *State v. Davidson*, 12 *Vermont*, 300; *State v. Elkins*, *Meig's Reps.* 109.

A bill of indictment endorsed a "true bill," where to the signature of the foreman, the letters "F. G. J." were added was held sufficient to indicate that he acted as foreman, where it appeared from the record that he was foreman of the grand jury when the bill was found. It was also said, that if no letters had been added after his name, his subscription to the endorsement could only be referred to his official act as foreman and would therefore be sufficient. *State v. Chandler*, 2 *Hawks* 439.

It seems, however, that signing the name of the foreman to the endorsement "a true bill" on a bill of indictment, though a salutary practice, is not essential to its validity. But whether this be so or not, a variance between the name of the foreman as appearing upon the record of his appointment and his signature upon the bill is immaterial, for his identity must necessarily be known to the court, and the receiving and recording the bill with his endorsement establishes it. *State v. Calhoun*, 1 *Dev. & Bat.* 374.

An endorsement by the foreman of the grand jury of the initial letter of his first name, where the record of the appointment states his name at full length, is not a material variance. *State v. Collins*, 3 *Dev.* 117.

Where it appeared by the record that A. B. was sworn as foreman, such was held sufficient evidence of his appointment. *Woodside v. The State*, 2 *Hov. Miss. Reps.* 655.

Where the finding is in writing and publicly announced by the clerk in the presence of the grand jury, it would seem to be sufficient without the signature of the foreman: *State v. Creighton*, 1 *N. & Mc.* 256; *Com. v. Walters*, 6 *Dane*, 290; but the omission of the words "true bill" cannot be supplied. *Webster's case*, 5 *Greenl. Reps.* 432; *State v. Squire*, 10 *N. Hamp.* 558; see *Wharton's American Criminal Law*, p. 128.

The grand jury have no authority by law to ignore a bill for murder on the ground of insanity, though it appear clearly from the testimony of the witnesses as examined by them on the part of the prosecution that the accused was in fact insane; but if they believe that the acts done, if they had been done by a person of sound mind, would have amounted to murder, it is their duty to find the bill; otherwise the court cannot order the detention of the party during the pleasure of the crown, as it can either on arraignment or trial under the *Stat.* 39 & 40 *Geo.* III. ch. 94. *R. v. Hodges*, 8 *C. & P.* 195.

Where a witness went before the grand jury without being sworn, but this was not discovered till after the prisoner's conviction, the judges on consultation declined deciding the validity of the objection but recommended a pardon. *R. v. Dickinson*, 1 *R. & R. Crown cases*, 401.

It was held in *Dr. Dodd's case*, 1 *Leach, C. L.* 184, that it did not lie in the mouth of the prisoner to object to the proceedings of the grand jury as informal and the evidence as improperly given them.

Two indictments for the same offence, one for felony under a statute and the other for the misdemeanor at common law, ought not to be preferred or found at the same time. *R. v. Doran*, 1 *Leach*, 538; *R. v. Smith*, 3 *C. & P.* 413.

It was held in *R. v. Humphreys*, 1 *Car. & M.* 601, that if the grand jury at the assizes or sessions have ignored a bill, they cannot after find another bill

against the same person for the same offence at the same assizes or sessions. This is contradicted in *R. v. Newton*, 2 *M. & Rob.* 503.

In Massachusetts and Maine the practice is, after a complaint is made to the grand jury for them to hear the evidence in support of it, before a bill of indictment is formally presented to them by the Attorney General; and if upon such inquiry they agree that a bill should properly be found, it is prepared and sent to them for their formal finding. *Webster's case*, 5 *Greenl.* 432, per *Mellon, C. J.*

The Court refused in *White's case*, 9 *Pick.* 495, to instruct the grand jury at the request of a prisoner whose case was coming before them, what evidence as to confessions of the accused, it would be proper for them to receive and find their verdict upon. *Contra Burr's Trial*.

In *Baldwin's case*, 2 *Tyler, (Verm.)* 473. The grand jury having received a complaint against one of their own number, came into court and asked that he might be ordered to withdraw from their deliberations. The court said they had no power to do so, but advised them to go on with their inquiry in his presence, if they thought proper. They did so, indicted him, and he was after convicted.

In 1680 the grand jury being about to present the Duke of York as a papist were discharged by the court (C. J. Scroggs) to prevent their so doing. The House of Commons resolved that the discharge of a grand jury before they had finished their presentments was a high misdemeanor: and they made it one of the charges against Scroggs on which to impeach him. 7 *St. Trials*, 479.

CHAPTER XXII.

CONCERNING THE DEMEANOR OF THE GRAND INQUEST, IN RELATION TO THEIR PRESENTMENTS.

THE coroners inquest may, and must hear evidence of all hands, if it be offered to them, and that upon oath, because it is not so much an accusation or an indictment, as an inquisition or inquest of office, *quomodo J. S. ad mortem suam devenit*, tho it be also true, that the offender may be arraigned upon that presentment.

But the grand inquest before justices of peace, gaol-delivery, or *oyer* and *terminer*, ought only to hear the evidence for the king; and in case there be *probable* evidence,^(a) they ought to find the bill, because it is but an accusation, and the party is to be put upon his trial afterwards.[1]

(a) This same doctrine is laid down by C. J. *Pemberton*, in the case of the earl of *Shaftesbury*, *State Tr.* Vol. III. p. 415. *Vide tamen* Sir *John Hawles* remarks on that case, *State Tr.* Vol. IV. p. 183. wherein he unanswerably shows, that a grand jury ought to have the same persuasion of the truth of the indictment, as a petit jury, or a coroner's inquest: *vide supra*, p. 61.

[1] "They are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer the charge. They ought however to be thoroughly

But if a bill of indictment for murder, or other capital offense be presented against *A.* if upon the hearing the king's evidence, or upon their own knowledge of the incredibility of

persuaded of the truth of an indictment so far as their evidence goes; and not to rest satisfied with merely remote probabilities." 4 *Blacks. Comms.* 303.

In *Lord Shaftesbury's* case, the grand jury were instructed "If there be probable ground it is as much as you are to enquire into."—"Whether there be cause or reason to put the party to answer."—"You do not condemn nor is there such strict enquiry to be made by you as by others that try the fact."—"If you doubt of the crimes upon the evidence given you, (in point of law) you must advise with us and we will direct you in matters of law."—"The jury are officers and ministers of the court." And it was held that the grand jury were not to judge of the *credibility* of the witnesses sent to them. 3 *State Trials*, 417.

Sir Charles Hedges at the admiralty sessions Oct. 1696, 6 *State Trials*, 1, in his charge to the grand jury says "You are not obliged in all cases to require a clear and full evidence, but only to examine till you find and are satisfied in your consciences that there is sufficient and just cause to put the party accused upon his trial." Sir John Hawles in his remarks on the Earl of Shaftesbury's grand jury in 4 *State Trials*, 183, controverts the opinion of the chief justice in that case, that the grand jury are not to judge of the *credibility* of the witnesses sent to them; because he says the grand jury are to judge by their own knowledge as well as by the evidence of witnesses.

In *Repub. v. Shaffer*, 1 *Dallas* 136. it was said to be the duty of the grand jury diligently to inquire into the *credibility* of the witnesses. In that case the grand jury asked that witnesses should be sent to them on behalf of the defendant in order that they might diligently inquire into the whole truth of the charge. *McKean, C. J.* held that no such evidence could be submitted to them; they could not enquire upon what foundation the charge was denied, but only upon what foundation the charge was made. For the bills or presentments found by a grand jury amount to nothing more than an official accusation in order to put the party accused upon his trial. It is the duty of the grand jury to enquire into the nature and probable grounds of the charge. See *Addison's (Penn.) Reps. App. p.* 39-40. And see *Lung's case*, 1 *Connec.* 428.

Evidence before the grand jury must be under oath and the best evidence not hearsay or second hand. 2 *Hawk. ch.* 25, § 138-139. In *Denby's case*, *Leach*, 580, it was held that the grand jury must not take before them the affidavits of the committing magistrates and judge upon them, when they can get the witnesses. See *State v. Boyd*, 2 *Hill (S. C.)* 288. See *Jerv. Arch. C. L.* 9th edit. 63.

It is said in *R. v. Russell*, 1 *C. & M.* 247, that it would be improper for the court to inquire after a bill has been found, whether the witnesses before the grand jury had been properly sworn, because such error would not vitiate the bill, in as much as the jury may find a bill upon their own knowledge merely. And Sir John Hawles contends in his remarks on the Earl of Shaftesbury's grand jury, 4 *St. Trials*, 183, that they should find the truth according to their knowledge or as it is presented them by witnesses. In *Tucker's case*, 8 *Mass.* 286, it was objected to one of the grand jurymen that he had been an accuser in a case of murder which would come before the grand jury for consideration; he was a neighbor too of the accused. The court said—"Those who live in the vicinity of the accused are probably better knowing than others to the general character of the parties and of the witnesses; and on this account are perhaps the more proper members of the grand jury. If however, any individual juror should be sensible of such a bias upon his mind that he could not give an impartial opinion in any case under the discussion of the jury, such juror would feel it his duty as it would be his right to forbear giving an opinion or perhaps to withdraw himself from the chamber while the discussion continued."

In the charge to the grand jury in the court of quarter sessions of Philadelphia

the witnesses they are dissatisfied, they may return the bill *ignoramus*.

If *A.* be killed by *B.* so that it doth *constare de per-*

September 1st 1845, it was held by *Persons, J.* that where any member of the grand jury is aware of a crime having been committed within the county he is bound to give that information to his fellows. And although under the Constitution, no process can issue to apprehend a citizen except the same is founded on oath or affirmation: yet when a presentment is made on the personal information of a grand juror, it is on his own oath, taken before he enters on the duties of his office to make communication of what he knows; and it is on this the court direct process to issue to apprehend the accused.

But see the opinion of *King, President*, in the same court, as given in *Wharton's Am. Crim. Law*, 115, where the court refused their process to assist in the investigation of a charge made by an individual member of the grand jury. It is said, "the right of every member of a body like the grand jury, to charge what crime he pleases, on whom he pleases in the secret conclave of the grand jury room, might produce the worst results;" and in that case, although it was said, "that the charge preferred by the grand juror, alluded to in the communication was clear and distinct;" yet the court refused their process for its investigation because the offence alleged was one "over which every committing magistrate of the city and county of Philadelphia had jurisdiction; any one of that numerous body might issue his warrant of arrest against the accused, his subpoena for the persons and papers named and compel their appearance and production; and if sufficient probable cause is shown, that the accused have been guilty of the crimes charged against them he may bail or commit them to answer to this court." "The differences to the accused," continues the learned judge, "between this procedure and that proposed, are, that before a primary magistrate the defendants have a responsible accuser, to whom they may look, if their personal and official characters have been wantonly and maliciously and falsely assailed. They have the opportunity of hearing the witnesses face to face. They may be assisted by counsel in cross-examining those witnesses and sifting from them the whole truth. And not the least, they by this means know what crime is precisely charged against them; and when, where and how it is said to have been perpetrated: rights which we admit and feel the value of and of which we would most reluctantly deprive them, even if we had the legal authority to do so." Whether the court meant to say in this case as was said in the Carolina case, *State v. Cain*, 1 *Hawks* 352, that the accusing and judicial function are incompatible, and that where the grand juror wishes to become an accuser he must take the new oath of the witness and cease to be a judge, does not distinctly appear. It was said that the grand jury have no power "to receive individual accusations from any source not preferred before them by the responsible public authorities, and not resting in their own cognizance sufficient to authorize a presentment." On the other hand a widely different construction of the powers of grand juries seems to have been adopted in *Ward v. The State*, 2 *Missouri Reps.* 120; it was there held that to say that grand jurors "are not to be trusted with the power to send for witnesses, till some malignant prosecutor or some injured person shall cause an indictment to be sent up to them, would strip them of their greatest utility and convert them into a mere engine to be acted upon by circuit attorneys or those who might choose to use them."

In the *State v. Cain*, 1 *Hawks Reps.* 352, it was held that the grand jury cannot find on the testimony of one of their own body it would be finding without an oath: the grand jury may make presentments on the knowledge of their own members or one of them, and upon such a presentment the attorney general may frame a bill of indictment and send it to them, but they can't find it except the grand juror becomes an accuser, is sworn in court and gives again his statement on oath to the grand jury. And see *State v. Roberts*, 2 *N. Car. Reps.* 542, to

sond occisi & occidentis, and a bill of murder be presented to them, regularly they ought to find the bill for murder, and not for manslaughter, or *se defendendo*, because otherwise offenses may be smothered without due trial; and when the party comes upon his trial, the whole fact will be examined before the court and the petty jury, and in many cases it is a great disadvantage to the party accused. (*) For if a man kills *B.* in his own defense, or *per infortunium*, or possibly in executing the process of law upon an assault made upon him, or in his own defense upon the highway, or in defense of his house against those that come to rob him (in which three last cases it is neither felony nor forfeiture, but upon not guilty pleaded he ought to be acquitted,) yet if the grand inquest find an *ignoramus* upon the bill, or find the special matter, whereby the prisoner is dismissed and discharged, he may nevertheless be indicted for murder seven years after.

But if the grand jury had found the bill for murder (yea or for manslaughter,) and the party pleading not guilty, the special matter is given in evidence, and the petty jury find the special matter; (or in the three last cases find him not guilty, as they may) this acquittal upon this finding will be a good plea of *autrefois acquit*, and he shall never be arraigned for it again.

If a bill be against *A.* for murder, and the grand inquest upon the evidence before them, or their own knowledge be satisfied that it was but *per infortunium*, or *se defendendo*, and accordingly return the bill specially, the court may remand them to consider better of it, or may hear the evidence at the bar, and accordingly direct the grand inquest; but I have known a judge blamed for setting a fine upon the grand inquest for such a return, because in truth it comes not up to felony.

But if a bill goes out against *B.* for murder, and it doth *constare de personâ occidentis*, may the grand inquest find the bill

(*) Notwithstanding this, according to lord Coke, 9 Co. 119. a. indictments, which concern the life of a man, ought to be framed as near the truth as may be.

same point. By the North Carolina act of 1797. ch. 2. sect. 3, a person cannot be arrested upon presentment of a grand jury, but not until after indictment found. See *U. S. v. Mundel*, 6 Call's Reps. 247.

In *King v. The State*, 5 Howard (Miss.) Reps. 730, Turner, J. says, "we see no reason why the person appointed by the court as the foreman of the grand jury, may not be a prosecutor as well as any other one of the grand jury. Unless expressly disqualified by law he is as competent to prosecute as any other person. Any one member of a grand jury may be a prosecutor or an informer. It is their peculiar province to inform against and to present all offenders against the criminal laws of the State."

for manslaughter, and *ignoramus* for the murder? and is the court bound to receive such a return.[2]

In this case, of all hands it is agreed, (b) that the grand jury is to blame, because they take upon them [159] to anticipate the evidence that is to be given to the petit jury, and so determine matter of law, which belongs to the court to determine, and by this means many murders may escape under the disguise of manslaughter, and so escape with their clergy.

Some therefore have made it a practice to set a fine upon the grand jury in this case, and it hath proceeded so far, as to fine petit juries also in such like cases; whereof hereafter.

That which I think herein, and in other concealments of grand inquests, is as follows, *viz.*

1. That the court may receive such a return from the grand inquest, and it is a matter of discretion, especially, if upon inquiry from the indictors or witnesses, or upon view of their examinations it doth plainly appear, that the crime amounts to no more.

2. That barely upon such a return no fine can be set upon the grand inquest, unless the evidence to the grand inquest be given at the bar in the presence of the court; for otherwise the court cannot understand, whether the grand inquest doth well or ill in such case.

3. That if the evidence to the grand inquest be given at the bar upon an indictment in the king's bench, and the grand inquest will not find a bill according to the direction of that court; as for instance, will find a man guilty only *se defendendo*, or of manslaughter, when it is murder, that court may set a fine upon the grand inquest, and so it hath been prac-

(b) This is far from being agreed of all hands, for such an anticipation of the evidence by the grand jury is what they cannot avoid, they being bound by their oath as much as the petit jury, to *present the whole truth, and nothing but the truth*; nor do they in this case so properly determine matter of law as matter of fact; for whether murder or not depends upon a preconceived malice, which (tho it is to be presumed, where no provocation appears,) is matter of fact, and proper for the consideration of a jury; and tho judges have sometimes fined jurors for not finding such bills for murder, yet such proceedings have been generally censured, as in the case of Sir H. Wyndham, and others, *P. 19. Car. 2.* who were fined by Keeling, C. J. for not finding a bill of murder, albeit they were satisfied the man died by the hand of the party indicted; but upon complaint in parliament, the chief justice was fain to submit. *2. Keb. 180.*

[2] It seems to be generally agreed that the grand jury must either find *bills vers* or *ignoramus* for the whole; and that if they take upon them to find specially, or conditionally, or to be true for part only, and not for the rest, the whole is void and the party cannot be tried upon it, but ought to be indicted anew. *2 Hawkins, 210.*

tised; for it is the highest court in *England* of ordinary justice, especially in criminal causes.

4. That if the justices of *oyer* and *terminer*, or [160] gaol-delivery having heard the evidence at the bar, the grand inquest will not find according to their directions, the justices may bind them over by recognizance into the king's bench, and upon an information against them they may be fined.

5. That in such a case justices of peace, *oyer* and *terminer*, or gaol-delivery may, according to the statute of 3 *H. 7. cap. 1.* impanel another inquest to inquire of their concealments, and thereupon set fines upon them.

6. But in my opinion fines set upon grand inquests by justices of the peace, *oyer* and *terminer*, or gaol-delivery for concealments or non-presentments in any other manner, are not warrantable by law; and tho the late practice hath been for such justices to set fines arbitrarily, yea not only upon grand inquests, but also upon the petit jury in criminal causes, if they find not according to their directions, it weighs not much with me for these reasons; 1. Because I have seen arbitrary practice still go from one thing to another, the fines set upon grand inquests began, then they set fines upon the petit juries for not finding according to the directions of the court; then afterwards the judges of *nisi prius* proceeded to fine jurors in civil causes, if they gave not a verdict according to direction even in points of fact; this was done by a judge of assize, (c) in *Oxfordshire*, and the fine estreated; but I, by the advice of most of the judges of *England*, staid process upon that fine; the like was done by the same judge in a case of burglary, the fine was estreated into the *Exchequer*; but by like advice I stayed process; and in the case of *Wagstaff*, (d) and other jurors fined at the *Old-Bailey*, for giving a verdict contrary to direction, by the advice of all the judges of *England* (only one dissenting,) it was ruled to be against law; but of this hereafter. (e) 2. My second reason is, because the statute of 3 *H. 7. cap. 1.* prescribes a way for their fining, which would not have been, if they had been arbitrarily subject to a fine before. 3. It is of very ill consequence, for the privi- [161] lege of an *Englishman* is, that his life shall not be drawn in danger without due presentment or indictment, and this would be but a slender screen or safe-guard, if every justice of peace, or commissioner of *oyer* and *terminer*, or gaol-delivery, may make the grand jury present what he

(c) Justice Hyde at Oxford. *Vaugh.* 145.

(d) *Vaugh.* 163.

(e) *Cap.* 42.

pleases, or otherwise fine them; and there is no parity of reason or example between inferior judges and the court of king's bench, which is the supreme ordinary court of justice in such cases; and thus far concerning fining of grand inquests.(f)

They are sworn to keep the king's counsel undiscovered,[3]

(f) The court of king's bench, it is true, may much more safely be trusted, than other inferior courts, but yet our author's arguments do sufficiently evince, that no court whatever ought to have such a power of making juries find what they please, nor has the law vested such a power in any court; for as to matter of fact, the jury are the sole judges, and herein are to be guided entirely by their own judgments and consciences; indeed in matters of law, the court is the proper judge, and the jury are not to find contrary to their direction; but even here they are not bound to follow the direction of the court, but if they cannot assent thereto, ought to find the fact specially; indeed where the fact is agreed, if they will obstinately find matter of law contrary to the direction of the court, there may be some reason why they should be fined, See *Hood's case*, *Kelyng* 50. but barely finding matter of fact against the direction of the court, is no sufficient cause to fine a jury, *Busket's case*, *Vaugh.* 153. and this distinction is founded on the antient maxim of the common law; *ad questionem juris non respondent juratores, sed judices; ad questionem facti non respondent judices, sed juratores.* Co. Lit. § 366. & *libros ibi.*

[3] The form of the grand juror's oath is given in *Shaftesbury's case*, Nov. 1681. 3 *Harg. State Trials* 417. "You shall diligently enquire and true presentments make of all such matters, articles and things as shall be given you in charge, as of all other matters and things as shall come to your own knowledge touching this present service; the king's counsel, your fellows and your own you shall keep secret; you shall present no person for hatred or malice, neither shall you leave any one unrepresented for fear, favor or affection, for lucre or gain or any hopes thereof; but in all things you shall present the truth, the whole truth and nothing but the truth to the best of your knowledge. So help you God."

In the *Book of Oaths* p. 206, (quoted in a note to 8 *Hew. St. Trials* 779), the oath as formerly used is given "Ye shall truly enquire and true presentment make of all such things as you are charged withall on the queene's behalf, the queene's counceill your owne and your fellowes' you shall well and truly keepe; and in all other things the truth present: so help you God and by the contents of this booke."

The form of oath as given in Addison's (Penna.) Reports, App. 37, is like to that first above except that instead of the clause requiring presentment "of such things as shall come to their own knowledge," the words used are, "as of those things which they may know of their own knowledge."

In Lord Shaftesbury's case, the king's counsel desiring that the evidence should be given publicly to the grand jury, it was held that such was their right; and this although the jury requested that it should be given them privately. It was said the grand jury are officers and ministers of the court and evidence was always given to them formerly in court. And it was unanimously held that the claiming a hearing publicly in court was an undoubted right of the crown; that the provision of secrecy, being for the advantage of the crown, its officers had a right to waive it and it was every day so done, and see ante 159. See Mr. Christian's note to 4 *Blacks. Comm.* 303. 16 *Car. 1*, before Foster J. *Clayt.* 84 pt. 14, (cited 13 *Viner Es. H. 1*.) The judge would not suffer a grand jurymen to be produced as a witness to swear what was given in evidence to them because he is sworn not to reveal the secrets of his companions. The reporter makes a

the revealing or disclosing whereof was heretofore taken for felony, 27 *Ass.* 63. but that law is antiquated, it is now only fineable; if there be thirteen or more of the grand inquest, a

quest; "for if the witness be questioned for a false oath to the grand jury, how shall it be proved if some of the jury be not sworn in such case?"

A few years ago, says Mr. Christian in a note to 4 *Bl. Comms.* 126, a gentleman of the grand jury heard a witness swear in court upon the trial of a prisoner directly contrary to the evidence which he had given before the grand jury. He immediately communicated the circumstance to the judge, who, upon consulting the judge in the other court was of opinion that public justice required in this case that the evidence which the witness had given before the grand jury should be disclosed and the witness was committed for perjury to be tried upon the testimony of the gentlemen of the grand jury. It was held the object of this concealment was only to prevent the testimony produced before them from being counteracted by subornation of perjury on the part of the persons against whom bills were found. This is a privilege which may be waived by the crown.

In *R. v. Marsh.* 6 *A. & E.* 236. The court refused to allow a grand juror to swear as to what passed in the grand jury room as to the number that found the bill.

In *R. v. Hughes* 1 *Car. & K.* 519. A person who had been in the room, not a member of the grand jury, was admitted to give evidence of what passed before them.

In *Freeman v. Arkel* 1 *C. & P.* 135. One of the grand jurors was called and proved who was prosecutor on a bill of indictment; it is said in a note "that a grand juror may be called to prove any substantive fact within his knowledge but not any thing which he hears as a grand juror or which comes within his oath of secrecy."

In *Watson's case* 32 *How. St. Trials* 107. Lord Ellenborough doubted whether a witness could be asked as to matters that passed in the grand jury room, he not being a grand juror.

In *Sykes v. Dunbar* (quoted in 2 *Selwyn's N. P. Wharton's edit.* p. 260.) Lord Kenyon is said to have held that a grand juror could be called to prove who was the prosecutor upon an indictment because it was a question of fact the disclosure of which did not infringe the grand juror's oath.

Mr. Greenleaff quoting from C. J. Weston in 1 *Shepl.* 86, says of this secrecy, "For the same reason of public policy in the furtherance of justice the proceedings of grand jurors are regarded as privileged communications. It is the policy of the law that the preliminary enquiry into the guilt or innocence of the party accused, should be secretly conducted; and in furtherance of this object every grand juror is sworn to secrecy. One reason may be to prevent the escape of the party should he know that proceedings were in train against him; another may be to secure freedom of deliberation and opinion among the grand jurors which would be impaired, if the part taken by each might be made known to the accused. The rule includes not only the grand jurors themselves, but their clerk, if they have one and the prosecuting officer if he is present at their deliberations; all these being equally concerned in the administration of the same portion of penal law. They are not permitted to disclose who agreed to find the bill of indictment or who did not agree; nor to detail the evidence on which the accusation was founded. But they may be compelled to state whether a particular person testified as a witness before the grand jury; though it seems they cannot be asked if his testimony then agreed with what he testified upon the trial of the indictment. Grand jurors may also be asked whether twelve of their number actually concurred in the finding of a bill, the certificate of a foreman not being conclusive evidence of that fact." 1 *Greenleaff on Evidence* 287 & 252, and see for cases cited.

In *Low's case* 4 *Greenl. Repts.* 439, it was held that a grand juror may be called

presentment by less than twelve ought not to be;[4] but if there be twelve assenting, tho some of the rest of their number dissent, it is a good presentment; for if twelve agree, it is not necessary for the rest to agree. *Lamb. Justice* 400.

But in case of a trial by the petit jury, it can be by no more nor less than twelve, and all assenting to the verdict,(g) accordingly it was adjudged, *M. 42 E. 3. Rot. 16. Suff. Rex.*(h) the judgment was reversed, because but eleven indictors.

But if a presentment be delivered into a court of sessions, and received, no amercement lies, that it was [162] not assented to by twelve, but otherwise it is in case of a presentment by a leet, for the party distrained, &c. may aver that it was not presented by twelve. *45 E. 3. 26. b. B. Leet 7.*

(g) See the inconveniencies hereof, *Pref. to State Tr. p. 7.*

(h) This case proves nothing as to the petit jury, it being an indictment on the coroner's inquest, as appears by the record, which is as follows: "*John Cobat of Ipswich*, was indicted by the coroner's inquest, consisting only of eleven, quod die Sabbati prox' ante festum Sancti Petri ad vincula anno regni regis, *E. 3.* post conquestum tricesimo quinto insultum fecit *Johanni le Swon* servienti Prioris sancte Trinitat'. *Gippewic* in suburbio libertat' villas predictas in quodam campo juxta *Tromons' Hegg* and dictum *Johannem le Swon* ibidem cum quadam arma vocat' *Sparth'* precii quatuor denar. verberavit felon' de qua quidem verberatione dictus *Johannes le Swon* moriebatur, sed languebat a dicto die Sabbati prox' ante festum Sancti Petri ad vincula usque ad diem jovis tunc prox' sequent." the which indictment was afterwards in *Mich'* term anno 42 of the same reign removed into the king's bench, "& continuato inde processu versus prefat' *Johannem* usque a die Pasche in xv dies anno regni regis nunc *Anglie* quadragesimo tertio, ad quem diem coram domino rege apud *Westm'* venit predictus *Johannes Cobat* per man', & viso & diligenter examinato per cur' indictamento predicto, pro eo quod compert. est in eodem, quod fuerunt nisi undecim juratores tantum in inquisitione predicta, ubi in qualibet inquisitione de jure fore deberent xii jurati, & sic videtur cur', quod indictamentum predictum minus sufficiens est ad prefat' *Johannem Cobat* ulterius inde ponere responsur.' Ideo idem *Johannes Cobat* ad presens eat inde sine die, salvo semper jure regis, &c."

to testify that twelve did not concur in the finding. (The jurors had been under a misapprehension that a majority of their number could find a bill.)

In Connecticut the prisoner may be present during the examination of witnesses before the grand jury. But the secrecy of their proceedings is held to be perpetual and to comprehend all others who are present as well as the jurors themselves. See *State v. Fasset*, 16 Conn. 464.

In *McLellan v. Richardson*, 1 Shepl. 83, it was refused by the court that the attorney general who was present should testify as to the proceedings of the grand jury.

"The secrecy of the oath was never intended to punish the innocent or obstruct the course of justice;" per *Huston J.* in *Huidekoper v. Cotton* 3 Watts 57. See *Addison's Reps.* App. p. 45.

In the proceedings upon bill of attainder against Sir J. Fenwick A. D. 1696, the house of commons admitted evidence by grand jurymen of what witnesses were before them and what they said. 5 *State Trials* 72.

[4] Low's case, 4 Greenl. 439.

The indictors are presumed in law to be indifferent, unless the contrary appear; 1. Because returned by the sheriff. 2. Because sworn by the court to present, and therefore shall never be charged by writ of conspiracy for any conspiracy before their being sworn, tho the party be acquit. 7 *H.* 4. 31. *b.* 19 *H.* 16. 19. *a.* But 21 *E.* 3. 17. by *R. Th.* it is a good replication to say, he procured himself to be returned of the grand inquest.

If a bill of indictment be for murder, and the grand jury return it *billa vera quoad* manslaughter, & *ignoramus quoad* murder, the usual course is in the presence of the grand jury to strike out *malitiose & ex malitiâ suâ præcogitatâ* and *murderavit*, and leave in so much as makes the bill to be but bare manslaughter, and so to receive it.[5]

But the safest way is to deliver them a new bill for manslaughter, and they to indorse it generally *billa vera*; for the words of the indorsement make not the indictment, but only evidence the assent or dissent of the grand inquest, it is the bill itself is the indictment when affirmed. And so in like cases, where the bill contains two offenses, as burglary and theft, forcible entry and detainer. *H.* 4 *Jac. B. R. Yelverton* 99, *Ford's* case.

The grand jury are sworn *ad inquirendum pro cor-*
[163] *pore comitatûs*, and therefore regularly they cannot enquire of a fact done out of that county for which they are sworn, unless specially enabled by act of parliament, but only in some special cases. *Mich.* 9 *Car. B. R. Bell's* case.

If a man had been stricken in the county of *A.* and had died in the county of *B.* the offender had not been indictable of murder, &c. in the county of *A.* because the death was in the county of *B.* neither had he been indictable in the county of *B.* because the stroke was given in the county of *A.* but by the statute of 2 & 3 *E.* 6. *cap.* 24. he may be indicted in the county where the party died, tho the stroke were in another county; and also the offender shall be tried there, but an appeal may be brought in either county. 7 *Co. Rep.* 2. *a. Bulwer's* case.

So if *A.* had committed a felony in the county of *D.* and *B.* had been accessory *before* or *after* in the county of *C.* *B.* could not have been indicted as accessory in either county at common law, but by that statute he is indictable, and shall be tried in the county where he so became accessory. *Stamf. P. C. Lib. I. cap.* 46.

[5] 2 *Hawkins* ch. 25 sect. 2; 1 *Chitty*, C. L. 322. Where there are two counts in an indictment as one for a riot another for an assault, the same may be considered as two distinct indictments and the jury may affirm the bill as to one of the counts and reject it as to the other. *R. v. Fieldhouse*, 1 *Cowp.* 325. See *State v. Wilburn*, 2 *Brewer*, 296.

So if a stroke were given *super altum mare*, and the party came into the body of the county, and there died, this is *casus omissus*, and the party is neither indictable by the jury of the county where he died, nor before the admiral, by the statute of 28 H. 8. cap. 15. Co. P. C. cap. 7. p. 48.

If *A.* robs *B.* in the county of *C.* and carries the goods into the county of *D.* *A.* cannot be indicted of robbery in the county of *D.* because the robbery was in another county; but he may be indicted of larceny or theft in the county of *D.* because it is theft wherever he carries the goods; the like law in an appeal, 4 H. 7. 5 b. 7. Co. Rep. 2 a. *Buhoe's case.*

But by the force of some acts of parliament, treasons and felonies committed in one county may be indicted and tried in another county.

By the statute of 33 H. 8. cap. 23. upon examination, as in that statute is provided, treasons, misprisions of treasons, and murders committed in any place within the [164] king's dominions, or without, may be enquired of, heard and determined, in any county where the king by his commission shall appoint.

This statute, at least as to the trial of treasons and misprisions, is repealed by the statute of 1 & 2 P. & M. cap. 10. *Stamf. P. C. Lib. II. cap. 26. fol. 89, 90. Co. P. C. cap. 2. p. 27.*

But it seems that statute stands in force as to indictments and trials of murder, the circumstances required by that statute being observed.

By the statute 35 H. 8. cap. 2. because some doubt was conceived, whether foreign treasons committed out of this realm might be enquired of, heard and determined within the realm, it is enacted, that such offences shall be enquired of, heard and determined in the king's bench, or in such counties where the king shall issue his commission by the good men of the same county.

This statute stands in force, not repealed by 1 & 2 P. & M. cap. 10. Co. P. C. cap. 2. p. 24.

By the statute 27 Eliz. cap. 2. treasons by priests or jesuits coming into *England*, and felony for receiving them; and by the statute 1 Jac. cap. 11. felony for taking a second husband or wife, the first living, are inquirable and determinable where the offender is apprehended; the like for felony in exportation of wools, by the statute of 14 Car. 2. cap. 18. But yet it was held at common law, that treason in adhering to the king's enemies beyond the sea, was inquirable and triable where the offender had lands, *vide Coke super Littleton, Sect. 440. p. 261. b. 5 R. 2. Trial 54.* but this is now

settled by the statute of 35 *H. 8. cap. 2. vide Co. P. C. cap. 1. p. 11.*

If *A.* by reason of tenure of lands in the county of *B.* be bound to repair a bridge in the county of *C.* if the bridge be in decay, he may be indicted in the county of *C.* that he is bound *ratione tenuræ* of lands in the county of *B.* to repair the bridge. 5 *H. 7. 3. 3 E. 3. Assise* 446.

The powers of the grand jury, as ruled by modern cases and in this country, do not seem to be very accurately or certainly defined, indeed the institution itself tested by our constitutional and other guaranties of freedom, and which whether they are better or not than those of *Magna Charta* may at any rate be said to intend and purport the largest personal liberty and security which is compatible with government, is somewhat anomalous in its character. If it be a judicial tribunal, its secrecy is at variance with all experience and theory of English law; and its power to adjudge upon the knowledge of its own members, without oath and without evidence, "*accusator et judex*," is at variance with all modern English theory of judicial proceeding. If it be only an *informing* and *accusing* not a judicial tribunal, its entire independence of the court, which it is the tendency of modern decisions to establish, contradicts the theory of the judicial system of the English law, and its irresponsibility again contravenes as well that as the American constitutional and statutory guaranties.

Sir William Blackstone, as do most modern law writers,* lauds it as the soul of English liberty; Jeremy Bentham† condemns it, as deforming English judicial proceedings, whose publicity is their honest boast.

The antiquity of juries has been disputed by learned men with much pertinaciousness. Some have claimed for them a Saxon and probably a much earlier origin;‡ Mr. Reeves thinks there is no great reason to believe that the Saxons had any juries of twelve men;§ that the jury of the present day is of Norman origin, having been introduced into Normandy by the Scandinavians under Rollo about the year 890, by the Normans brought into England and endeavoured to be substituted for the Saxon *sectatores*, to which it bore some distant resemblance,|| and it may be doubted whether the *sectatores* ever acted as an inquest to make inquiries of crimes and delinquents as juries did after the conquest.¶ However disputed in its remote origin and ancestry, the trial by jury which has grown into the present system, bears more immediate date in the reign of Henry the Second, when it is supposed to have been introduced more generally by statute into England and to have been an accompaniment of the Norman itinerant courts which were the production of that or the preceding reign.** In matters of property it was called *assisa*, *recognitio*; in other instances *jurata patriæ* or *vicineti*, *inquisitio*, *juramentum legalium hominum*.

Jurors and grand jurors, as at present distinguished, are confounded in their origin; the jury which accused is found as early in the English law as that which tried offenders; the word *inquest* seems to have been equally applied to both. When to proffer an accusation, or as it would now be called to become a prosecutor, was to proffer the duel to the accused if he chose it, the accusing inquest may have been an essential medium for the prosecution of offenders,

* 2 Hale's History of the Com. Law; 2 Wilson's Works, 361; per Day, J. 81 How. St. Trials, 565.

† Rationale of Judicial Evidence, vol. 2, p. 314.

‡ 3 Blacks. Comms. ch. 23; Co. Litt. 155 b.; Preface to 8 Reps.

§ History of the English Law, vol. 1, p. 22.

|| Reeves, vol. 1, p. 84.

¶ 1 Reeves, 22; contra, 3 Blacks. Comms. ch. 23.

** 1 Reeve, 85; 4 Blacks. Comms. 422.

where the party having the immediate knowledge of the crime was unwilling to incur so dangerous and, except where personal honour demanded it, so uncalled for a risk.

Glanville, who was Chief Justice in the reign of Henry the Second and wrote learnedly and profoundly of part of the laws of England, and out of the fair fields of whose labours Lord Coke acknowledges himself to have gathered much fruit,* in the part of his treatise "*De placitis criminalibus ad coronam domini regis spectantibus*,"† speaks of cases where "*nullus appareat certus accusator, sed fama solummodo publica accusat*." He gives no explanation of this "*fama publica*," but it has been fairly supposed to mean the "*sacramentum legalium hominum*" of the statute of Northampton;‡ and to be the same "*fama patrie*"§ of which Bracton gives a much fuller account. Glanville describes the criminal trial to be after accusation as follows: "*deinde autem per multas et varias inquisitiones et interrogationes coram iusticiis faciendas inquiretur rei veritas et id ex verisimilibus rerum indiciiis et conjecturis, nunc pro eo nunc contra eum qui accusatur facientibus*."¶ The meaning of *inquisitiones* is somewhat explained by reference to Lib. 9, § 11, when speaking of the offence of purpresture, he says, "*inquirentur autem coram iusticiis regis ad tales inquisitiones faciendas in diversas regni partes transmissis per juratam patrie sine visneti*."

Bracton, who is supposed to have finished his work in the end of the reign of Henry the Second, whose copiousness, learning and profoundness place him, says Mr. Reeves, very high above the other antient law writers and entitle him to the praise of being the father of English legal learning, gives the following full and satisfactory account of the inquest of his day:

"When the itinerant justices meet at a certain time and place, of which there is to be not less than fifteen days' notice, they begin with the pleas of the crown. First, the king's writ is read giving them authority. Then, if they choose, one of them, [*quidam major et discretior*] makes a public address upon the necessity of peace and good order and the utility of this institution. Which done the justices betake themselves to a secret place, [*in aliquem locum secretum*] and having called to them four, six or more of the principal persons of the county [*maiores, qui dicuntur busones comitatus*] they shall hold discourse with them and explain to them, how it is provided by the king and his council, that all, as well knights as others, who have arrived at the age of fifteen years should swear that they will not conceal or assist criminals and offenders, but will point them out to the sheriff and bailiffs and cause them to be arrested; that if they hear of hue and cry made they will immediately follow it with their family and workmen; that if any one is killed by misfortune or design hue and cry should immediately be raised till the offender is taken; that they will not harbour suspected persons but will inform of them; that they will not receive into their houses by night any person that is not well known, and if they should thus receive any one for hospitality, they will not allow him to depart till broad day-light and with the witness of three or four of their neighbours. After that there shall be called together the tenants and bailiffs of the hundreds, and they shall be enrolled in order of their hundreds or by wapentakes, and the names of the tenants, of whom each one shall swear that from his hundred he will elect four knights, who shall at once appear before the justices to obey the order of the king, which knights shall be sworn to elect twelve knights or free and upright men, if knights cannot be found who accuse no man [*qui appellat neminem*] nor are themselves accused or suspected of crime, and by whom the business of the king may the better and more usefully be despatched. And the names of these twelve they shall cause to be enrolled in a schedule and they shall deliver the schedule to the justices. The twelve knights when they appear, shall be sworn in this form; the first shall say, 'Hear

* Preface to 8 Reps.

† Lib. 14, cap. 1.

‡ 1 Reeves, 195; see too Mr. Beames' Note to his edition of Glanville, where this opinion is corroborated and well enforced.

§ 2 Reeves, 31.

¶ Lib. 14, cap. 1.

this, O ye judges, that I will speak the truth of that concerning which you shall inquire of me on behalf of the king and will faithfully do that which you command me on his behalf, nor for any one will I omit to do so, but I will do it to the best of my power, so may God help me and these his holy gospels.' And after him each one of the others separately and for himself shall swear 'the oath which A., the first juror, has sworn, I will upon my part keep, so may God help me and these his holy gospels.'" After this the heads of those things shall be read to them in order, concerning which they shall answer to the judges. And let it be told them that upon each head they are to answer separately and sufficiently in their verdict, which they are to have ready at a certain day: and let it be told them secretly, so that if there be any one in their hundred or wapentake, who is suspected of any crime, they may immediately arrest him if they can, but if not, then let them secretly deliver the names of such to the judges, and of all those who are suspected, in a certain schedule; and it shall be commanded to the sheriff that he immediately take them and bring them before the judges, that justice may be done concerning them. The heads of charges to the twelve jurors should be varied according to time and place. Bracton then gives the heads of charges to the jurors; including every sort of criminal offence, offences against statutes, the revenue, or affecting injuriously the administration of the government."^a

In chapter 22d "De indictatis per famam patris ex suspitione," Bracton treats of the trial of those who have been thus accused. But before the accused is put upon his trial he gives the duty of the judge, which we quote for the purpose of showing the entire subjection of this irresponsible inquest to the supervision and control of the judge. "Justiciarius igitur si discretus sit, cum propter famam et suspitionem per patriam debeat veritas inquiri, si indictatus de crimine ei imposito culpabilis sit vel non, imprimis debet inquirere, si forte dubitaverit et jurata suspecta fuerit, a quo vel a quibus illi duodecim dedicerunt ea quæ in veredicto suo proferunt de indictato; et audita super hoc eorum responsione de facili pendere poterit, si dolus subfuerit vel iniquitas. Dicit forte aliquis vel major pars juratorum quod ea quæ ipsi proferunt in veredicto suo dedicerunt ab uno ex conjuratoribus suis et qui interrogatus forte dicit quod illa didicit ab illo tali et sic descendere poterit interrogatio et responsio de persona in personam usque ad aliquam vilem et abjectam personam et talem cui non erit fides aliquatenus adhibenda. Et ita inquirat justiciarius in hujusmodi quod gloria sua et laudis sue titulus cumuletur; et mature dicatur Jesus crucifigatur et Barabas liberatur; per hujusmodi enim inquisitiones si diligenter et caute non factæ fuerint multe inveniri poterunt inconvenientia."

After the exercise over the inquiring inquest of this power of purgation by the bench in cases where it may seem called for, the jury who are to try are sworn, "Hoc auditis justiciarii quod veritatem dicemus de iis quæ a nobis requirentur ex parte domini regis, et pro nihilo omittimus quin veritatem dicemus, sic nos Deus adjuvet," &c. Mr. Reeves considers this second the same jury put to reconsider their verdict, sworn again in different form of oath and who are under the direction of the justices and upon review of the matter to give their verdict finally. The array of jurors summoned was but one for inquests to accuse as well as to try; whether this second jury was composed in Bracton's time of the very same jurors who found the accusation seems however doubtful.

Britton, who is supposed to have written under Henry the Third, and whose book was published under Edward the First, § in chap. 2d. "De Eyres" after giving much the same account, though not so much at length, with Bracton of the coming into the county of the Justiciarii Itinerantes and the summoning of the jurors and the inquests to discover offenders, with which they are charged; gives an account of the trial of the persons so presented. It would appear from Britton

^a De Corona, cap. 1.

† Vol. 2. p. 33.

‡ And see 2 Reeves, 269.

§ As M. Howard considers "dans la vue d'effacer les impressions que les jurisconsultes dont la Fléta n' étoit que l'abbreviateur avoient essayé de donner au peuple contre l'autorité monarchique." But see Selden's note to Hengham, cap. 2. || Chap. 4. "De faneours et de monoye."

that though the array which accused was the same with that which after tried, the jurors might be different; indeed that having been an indictor was a sufficient cause of challenge, if the accused chose to avail himself of it.* Britton† makes applicable to this second jury very much the same tests and inquiries as to the means of their knowledge, which Bracton, as before given, says it is the duty of the justices to apply where they suspect or doubt: but Bracton applies these inquiries to the first jury. The charge of an offence by a private accuser and the rights of the accused in that event; the accusation by an inquiring jury, our present grand jury; and the trial by inquisition or inquest; as they are respectively detailed in the old law books, are so strikingly analogous to the accusing processes in the canon law of *accusation*, *denunciation* and *inquisition*, that they would seem certainly to have been derived from the same source. The object of the *denunciation* was, that an offence being thus made known to the judge, he should have the power of making further inquiry concerning the truth of it.

What we now call the grand jury would seem to have originally consisted, like all other inquests in the English law, of twelve only. Bracton speaks of this as their number within each hundred:† Britton says§ “et a chescun *dozayne* soient les chapitres severamment liveres:” the Mirror says of the duty of the coroner which was to hold most or many of the pleas of the crown “les jurors soient severés per *doussains*, si que nul *doussain* ne parle a autre, eins respaigne chescun jurey per soi.”|| Spelman, at a later day, says “*Jurata delatoria excedat duodenum quotis judicii placuerit; non autem deficiat.*”¶

Whatever may be the magic** of the number twelve as legal antiquarians have endeavoured to trace it, its unanimity, which is peculiar to the English jury, seems always to have been required in criminal cases;†† although not so certainly settled in questions of property till the reign of Edward III.‡‡ “The unanimity of twelve men, says Mr. Christian,§§ so repugnant to all experience of human conduct, passions and understandings, could hardly in any age have been introduced into practice by a deliberate act of the legislature.” The ancient doctrine of *afforcement* may have accommodated in practice this theoretical difficulty in the jury to try; and the want of this doctrine in the practical operation of the jury to inquire, as we do not find it applied to them, may have caused the subsequent increase of their numbers *quotis judicii placuerit*; twelve being still required for a finding in accordance with “immemorial antiquity.”

The two juries are distinguished by Spelman||| as *jurata delatoria* and *jurata judiciaria*. “*Jurata delatoria* ea est quæ delinquentes rimatur, eorum que nomina una cum delictis ad judicium deferit, ut in examen vocati, juris subeant sententiam, sive ad condemnationem sive ad deliberationem:” “*dicitur hoc et inquisitio.*” “*Jurata judiciaria* ea est quæ de summa litis, quoad factam, discernit priusquam iudex de jure pronunciat.” Of the *jurata delatoria*, he says, there are two.—*Magna Inquisitio*, the *grand jury* or great inquest and *Minor Inquisitio*; the one summoned for the county, the other for the hundred. The “*jurata judiciaria*,” he also divides into civil and criminal; the latter called also “the jury of life and death.”

The name *grand jury* was used in its origin not as now to distinguish the jury which accused from that which tried; but to distinguish the jury summoned from the whole county from that summoned from the hundred only. The following account is given by Mr. Reeves of the change from this inquest for the hundred to the inquest for the county, the present grand jury. “In the time of Bracton the presentment of offences was by a jury of twelve returned for every hundred in the county. But that practice had now received some small alteration, for towards the close of the reign of Edward the Third, we find at a commission of

* And see stat. 25 Edw. 3. chap. 3. which afterwards so enacted.

† Chap. 4.

‡ 116. a.

§ Chap. 2.

|| Chap. 1. sect. 12.

¶ Gloss.

** Co. Litt. 155. a.

†† 2 Reeves, 270.

‡‡ 3 Reeves, 105.

§§ Note to 3 Blacks. Comms. 376. See 2 Hale's Hist. of the Com. Law, p. 150, note F.

||| Gloss.

oyer and terminer that beside the return of an inquest for every hundred by the bailiff, the sheriff likewise returned a panel of knights, which says the book are *le graunde inquest*. The inquests for the hundreds still made their presentments as in Bracton's time; and if they presented, they likewise no doubt found indictments; but these were confined to their different hundreds. The grand inquest probably was to inquire at large for every hundred in the county, and the hundredors became jurors in inquests de bono et malo or ex officio when called upon; and if a commission of assize and nisi prius were sitting, they filled the place of jurors occasionally in assizes and juries in civil causes. When the practice began of returning a grand inquest to inquire for the whole body of the county, the business of the hundred inquest must naturally decline, till at length the whole burthen of presenting and finding indictments devolved upon the grand inquest and the hundredors continued to be summoned merely for trying issues.**

The criminal jury which tried, as well as that which accused, were in their origin but witnesses,† summoned from the neighbourhood for their supposed knowledge, sworn to speak the truth and responsible under the severest penalties for the integrity of their verdict.§ If some of the jury declared their ignorance of the matter given them in charge, such of them were to be withdrawn and others substituted in their stead|| and Britton† applies this doctrine of *afforciamet* to the jury who tried in criminal cases. The consent of the prisoner to be tried by the jury thus afforded being required: and if he would not consent, he was put to penance, "*peine forte et dure*," till he consented.**

The change in the nature of trial by jury, radical and entire as it appears viewing the system now and then, was of course gradual and progressive in its accomplishment,†† and brought about by the extension of the requirements of society and property. When written evidence came to exist, its use in many cases became necessary to the ends of justice; one admission led to another, till the trial by a jury of witnesses, whose competency consisted in their knowing all about the case, has been changed into the present trial by jurors, whose best competency consists in their knowing until sworn nothing of the case. In seventh Henry the Sixth,†† full knowledge by a juror of the thing in issue and his having expressed his opinion upon that knowledge was held no cause of exception to him. It was not, says Mr. Reeves, till the times of Edward the Sixth and Mary that the merely judicial character of jurors was entirely established.§§ Indeed the doctrine of the present day of finding upon the evidence and excluding their own undisclosed

* 3 Reeves, p. 133.

† 2 Reeves, 270; vide Fortescue de laud. caps. 20 and 21 and Selden and Waterhouse's notes; "*Eisdem enim modis amoveri poterunt juratores a sacramento quibus et testes amoveri a testimonio*." *Fleta lib. 4. cap. 8*; "the books of *Fleta*, consuetudines feodorum, contain, says Mr. Duponceau in his notes to Butler's horse juridica, the best means of becoming acquainted with the feudal law and show clearly as lord Kaimes contends that the trial by jury was originally a trial by twelve witnesses, who deposed of facts within their own knowledge." See Law Tracts, p. 85.

‡ See stat. 28 Edw. 1. chap. 9; and 34 Edw. 3. chap. 4.

§ See 34 Edw. 3. chap. 7.

|| Glanv. lib. 2. cap. 17; Bracton, 187, b.; Mirrour, chap. 4. sect. 24; *Fleta lib. 4. cap. 9. sect. 9.*

† Cap. 4.

** See stat. 8 Edw. 1. chap. 12; *Fleta lib. 4. cap. 9.* speaking of the assize says it shall be in the choice of the judges thus to *afforce* or "*compellere ad concordiam*," videlicet, "*quod vicecomes ipsos sine cibo et potu custodiri faciat, donec unanimes fuerint et concordet*."

†† Held in 37 Henry 6th that the inquest ought to be full without the witnesses; and if any one of the witnesses shall be returned upon the inquest, he shall be ouste, and if the inquest and the witnesses can't agree, the verdict of the inquest alone shall be taken. Bro. Abr. 270. 23 As. Pl. 11.

‡ Year Book, p. 25.

§ 2 Reeves, 272.

personal knowledge from all influence in the finding of the jury,* would seem to be of still later establishment. Sir Matthew Hale says† that a jury may find on their own knowledge of the fact and differently from the evidence. The form of oath was then as now to find according to the evidence. It was held by Lord Holt in 1698 that in case a jury give a verdict on their own knowledge they ought to tell the court so; but the fairest way would be for such of the jurors as had knowledge of the matter, before they are sworn, to inform the court of the thing and be sworn as witnesses.‡ In Henry Care's "English Liberties" published in 1719,§ it is said, "The grounds upon which grand juries are to proceed in giving their verdicts are either 1. From their own knowledge, and so they may find an indictment against a person though there be never a witness at all to it; and a petty jury may in like manner find a person guilty of a felony or murder whereof he stands indicted, though no witnesses appear to prove it; and the reason thereof is because the juries being always of the vicinage, the law supposes they may know the matter of their own knowledge; and therefore in all such cases when a jury is charged with a prisoner and after the indictment read, witnesses fail to appear, the court always speaks thus to the jury, 'Gentlemen, here is A. B. stands indicted of a crime, but here's no witnesses come against him, so that unless on your own knowledge you know him guilty, you must acquit him.' 2. The other ground upon which grand juries are to proceed is the testimony of witnesses." Whatever may be the authority of this book, and whatever may have been even at the date of its publication the legal soundness of the position which it assumes,|| it shows strongly, that the finding upon their own knowledge, which seems to have survived to the grand jury though no longer to the petit jury, was until a late day, the attribute of both in common, and for the same reason; and if the grand jury is to be considered a *judicial* tribunal, no reason can be given why this attribute should be continued to the one jury more than to the other. While jurors as well as grand jurors partook of the character of witnesses, more than of the jurors of the present day, but little can be expected to solve the question, how far they may find upon their own knowledge; still some light upon this subject appears long before the jurata *judicialia* so completely changed its nature and even then individual accusation by the members does not seem to have been the object of or permitted to the inquest. Bracton¶ gives as the proper persons to be charged with the capitula, those who accuse no man, "qui neminem appellat." Britton too says,** "de nos mortels enemys demoraunts en nostre terre nuly presentement proprement ne poit estre, mes encusement et appel, si come appara entre les appels."

The secrecy of the grand jury which might fairly startle a philosophical inquirer†† into English law considered as a *judicial* tribunal and independent of the control of the court,‡‡ is not at all startling on the pages of Bracton where it appears only as an *accusing* and *informing* tribunal and entirely subject to that control. Mr. Christian§§ is quoted||| as giving the true reason of this secrecy, and

* See *King v. Sutton*, 4 M. & S. 532; *Pennsylvania v. Leach*, Addison's Repts. 353.

† 2 Hist. of the Com. Law, 149.

‡ The *King v. Perkins*, Holt's cases 404; and see *Bushell's case*, Vaughan's Repts. 149, and cases cited; *Bennet v. Hartford Hundred*, Styles 233, Mich. A. D. 1650.

§ 4th ed. p. 253.

|| It appears to have been written in support of the powers of jurors, both grand and petit and their independence of the control of the court.

¶ Cap. 1, de corona, ib. Fleta, lib. 1. cap. 19.

** Chap. 3, De Capitulis.

†† See Jeremy Bentham ut supra.

‡‡ See *R. v. Russell* 1 C. & M. 247; *Low's case* 4 Greenl. Repts. 439; *State v. Boyd* 2 Hill's (S. Car.) Repts. 288; *Imlay v. Rogers* 2 Halst. Repts. 347; *Comth. v. Clark* 2 Browne (Penna.) Repts. 323; *Ridgway's case* 2 Ashmead (Penna.) 258; *Jones v. The State* 2 Blackf. Repts. 476; *State v. Fassett* 16 Conn. Repts. 464.

§§ Note to 4 Blacks. Comma. 156.

||| 1 Chitty's Crim. Law 317.

for which he quotes an unreported case, as being "to prevent the testimony produced before the grand jury from being contradicted by subornation of perjury on the part of the persons against whom bills are found." Bracton's account would seem much more reasonable: "*et secreta dicatur eis, quod si sit aliquis in handredo vel wapentakio suo, qui male creditus sit de maleficio aliquo, illum statim capiant si possint, si autem non, tunc secreta habere faciant iustitiariis nomina talium et omnium illorum qui male crediti sunt in quadam shedala, et præcipietur vicecomiti quod illos statim capiat et captos venire faciat coram iustitiariis ut iustitiarii de iis faciant iustitiam.*"[†] In the account contained in Fleta of the coming into the county of the Justitarii itinerantes, no injunction of secrecy is spoken of in charging the inquiring jury with the capitula, but, what perhaps well explains it, it is given as part of the oath of the "ballivi servientes et bedelli" [who Bracton says are sworn to elect the knights who are to select the jurors] that "*arcana cancellabunt,*" they will keep secret things proper to be kept secret. That there was to be any *judicial secrecy* for the protection of the juror or independent of the court is contradicted by the whole tenor of its injunction and indeed in terms by the passage from Bracton before quoted as to the supervisory duty of the judge. Scarlet's case[§] shows the exercise of that right by the court and its importance too. In Lord Shaftesbury's case^{||} the grand jury who wished that the evidence should be submitted to them privately, argued with the court the question of secrecy: but it was held, and apart from the authority the reasoning of the case is satisfactory, that the grand jury are but officers and ministers of the court, to whom the evidence used formerly to be submitted in court, that their private hearing of it had been substituted but for the conveniency of the thing, that the secrecy of the inquiry was but for the benefit of the crown and which the officer of the crown well might waive. It is plain that with however laudable an intent and however much in accordance with the sympathy of some later law writers,[¶] the grand jury in this case were disposed to act out of their sphere and to go beyond their proper jurisdiction for the protection of the defendant.^{**} That the inquiry should be secret "to prevent the testimony produced before the grand jury from being counteracted by subornation of perjury on the part of the persons against whom bills are found"^{††} would, to say the least, be an extraordinary reason, on which to found a judicial system or part of a judicial system. That "it is a part of the policy of the law"^{‡‡} or that it is "lest a timid juror might be overawed by the power and connexions of the individual charged"^{§§} would certainly be to make this contradict every other part of the policy of the common law, whose great and only secure basis is responsibility^{|||} and which offers to no other of its

* See *McLellan v. Richardson* 1 Shepl. Reps. 69; 1 Greenl. on Ev. § 252.

† De corona cap. 1.

‡ See Fleta cap. 18 lib. 1 de coronatoribus.

§ 7 Reps. pt. 12 p. 98, and 3 Inst. 33.

|| 3 St. Trials 420.

¶ See Sir Jno. Hawle's remarks 4 St. Trials 183; and Mr. Christian's note to 3 Blacks. Comms. 303.

** See 3 St. Trials p. 423 when the foreman desired to see the warrant of commitment.

†† See Mr. Christian's note to 4 Blacks. Comms. 196, and *Crocker v. The State Meigs* Reps. 130.

‡‡ See 1 Greenleaf on Evidence § 252.

§§ See per *Weston C. J. McLellan v. Richardson* 1 Shipley's Reps. 86.

||| The theory of the English law that there shall be no power irresponsible and that where there is no responsibility there shall be no power was strongly shown in the difficulty between the king and the commons which led to the petition of rights and which arose out of the imprisonment of Hampden and the others who refused to pay the forced loan levied by the king of his own authority without act of parliament. Upon habeas corpus taken to have these persons bailed "their commitment by order of the king" was returned to the writ, without setting forth further cause. And this, whether a commitment by the king must not show a cause, was one of the questions between the king and the commons; although

officers so unworthy a lure to duty. That it is "ut si sit aliquis male creditus, illum statim capiant" would seem reason and enough; particularly when we consider that until lately all arrest by justices upon suspicion without inquest was a matter of much doubt in the English law.† In Connecticut the prisoner is admitted to the grand jury room and to cross examine the witnesses produced against him, yet the secrecy of the proceeding which is thus annulled for every proper and original purpose, seems to be still used to mar justice by preventing the disclosure of facts important to its purposes. See the *State v. Fasset*,‡ where it is held that a witness may be indicted for perjuring himself before the grand jury, but every possible means of his conviction seems to be taken away. When secrecy came to be a part of the grand juror's oath does not appear. The more ancient form of oath as before quoted§ is not materially different from the present form in this respect. Lambard who wrote in the beginning of the reign of James the First says in his advice to grand jurors|| "finally, that they discover not their own doings, for it is usually a part of their oath, that they shall keep the king's counsel and their fellows."

The present grand jury seems to have been in its origin only an accusing tribunal to inform the justices of the offenders and criminals within the county where they were holding their court,¶ not at all considered as now a privilege and right of the subject and a protection of his liberty,** but on the contrary a means and power of the government.†† That this was so appears from the early writers in the English law before quoted. That it continued long so is shown by what Lambard says‡‡ in speaking of this jury of inquiry for the county, that it "is made up with us, for the most part, of the constables only." Fortescue, whose book is in fact as well as by title "*de laudibus legum anglie*," although he treats fully of the merit of the trial by jury and extols it extremely, in criminal cases as among the "*juvamina ob favorem vite*," says nothing of the judicial protection of the accusing inquest. The presentment of the grand inquest was but one of the means of accusation, of which there were many: it would appear from Bracton that where there was an individual accuser who laid his charge before the justices the grand inquest took no cognizance of it; but the prisoner was put upon his trial and that trial might be either by duel or by what we now call a

the lawyers in the house of commons went further and contended that there could be no commitment at all by order of the king. In a letter which the king addressed to the lords, 7 St. Trials 198, while the petition of rights was debating between the houses, he agreed to yield the point of forced loans and never to make another; but he would not give up the point of "shewing the cause of his commitments" on return to habeas corpus, because it often happens that should the cause be shewed the service would thereby be destroyed and defeated. And this is the same reason that would formerly appear in the law, for the secret power of process for grand juries. But the commons withered this flower, the alleged prerogative of the crown. In the debate in the house of commons, 4 Car. upon the right of the crown to imprison in any case, Sir E. Coke denies such right because the king is irresponsible and on this ground contends that the stat. Westm. 1, which gave the right to imprison on the "*præceptum domini regis*" meant and had always been construed the præceptum of his justices of the King's Bench and common pleas who are responsible.

* Bracton *sup.*

† See 4 Inst. 176. 2 Hale 108. 2 Hawkins chap. 13 § 18.

‡ 16 Connec. Reps. 464.

§ Book of Oaths p. 206.

|| Eirenarcha Book 4 chap. 3 p. 402.

¶ An indictment is "an accusation by the jurie of the offender and an information of the court, from whence they receive their charge of his offence. Pulton, 162. b. and see Lambard, lib. 4. cap. 3. p. 401.

** See Hale, Blackstone, Wilson, &c. ante.

†† Although no doubt a means early found safer and better for the subject than other irresponsible accusations, as see stat. 25. Edw. III. chap. 4.

‡‡ Eiren. lib. 4. cap. 1. p. 398.

petit jury at the option of the accused.* Indeed until abolished by statute 59 Geo. III. an appeal properly begun and after abandoned or otherwise prevented from completion put the accused upon his trial, as an indictment, without any intervention of the grand inquest.† Lambard says that these justices “*who take knowledge*” by the labour of jurors in inquests, may have understanding also by other men, and that is to be done either by the presentment of public officers or by the information of private persons: in some cases they may hear one another, and in such case, the report, of one of the justices, hath the force of the presentment of twelve men, so that he and his fellows may proceed upon it.”‡

* De Corona, 151. a. cap. 32.

† See the text ante; and 2 Hawkins, chap. 25. § 10. The common law seems to have favoured this individual accusation over that of the accusing tribunal, for without it until stat. 21. Hen. VIII. chap. 11. there was no restitution of the goods upon conviction of larceny, except where the individual, not the inquest accused.

‡ Eiren. lib. 4. cap. 6. p. 107.

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CHAPTER XXIII.

CONCERNING THE FORMS OF INDICTMENTS IN CASES CAPITAL,
AND FIRST TOUCHING THE FORM OF THE CAPTION RETURNED
UPON A CERTIORARI.

It will be a business of too much length, and beside my intention to treat of all indictments in cases of criminal, but I shall confine myself only to those that are capital.

Touching the forms of indictments, there are two things considerable: 1. The caption of the indictment: 2. The indictment itself.

The caption of the indictment is no part of the indictment itself, but it is the style or preamble, or return that is made from an inferior court to a superior, from whence a *certiorari* issues to remove; or when the whole record is made up in form, for whereas the record of the indictment, as it stands upon the file in the court, wherein it is taken, is only thus: *Juratores pro domino rege super sacramentum suum præsentant*, when this comes to be returned upon a *certiorari* it is more full and explicate, viz. in this form:

Norff. *Ad generalem sessionem pacis tent' apud S. in comit' prædicto 5 die Octobris anno regni, &c. 25 coram A. B. C. D. & sociis suis justiciariis domini regis ad pacem dicti domini regis in comit' prædict' conservand', necnon ad divers' felonias transgress' & alia*

malefacta in eodem comitat' audiend' & terminand' assignatis, per sacrament' E. F. G. H. &c. proborum & legalium hominum comit' prædict' jurat' & oneat' ad inquirend' pro dicto domino rege & pro corpore comit' prædict' existit præsentatum.[1]

1. First, The name of the county must be in the margin of the record, or repeated in the body of the [166] caption.

2. The court where the presentment is made, must be expressed, viz. *ad generalem sessionem pacis, &c.* or *ad generalem gaolæ regis deliberationem, &c.*[2]

3. It must appear where the session was held, and that the place where it was held is within the extent of the commission, and therefore if *Dorset* be in the margin, and the caption be *ad generalem sessionem pacis tent' apud S.* and says not *in comitat' prædicto*, it is nought, *H. 42 Eliz. B. R. Ludlow's case, Croke, n. 10. p. 738. P. 40 Eliz. B. R. Croke, n. 4. p. 606. Child's case*; so if west-riding in *comit' Eborum* be in the margin, and caption be *apud S. in comit' prædicto*, it shall be quashed, because it doth not say *apud S. in west-riding in comitatû prædict T. 5 Jac. B. R. and P. 9 Jac. B. R. Thorny's case, Croke, n. 6. p. 276.*[3]

4. The justices names, *H. 42 Eliz. B. R. Ludlow's case.*

But it is not necessary to name all the justices by name, but the rest may be supplied by the words (*& sociis suis, &c.*) But so many are fit to be named as are enabled by their commission to hold a session, and the return of the caption is supposed to agree with the title of their sessions.[4]

5. The title of their authority, as *justic' ad gaolem domini regis com' prædict' deliberand'.*

And *note*, that if there be a session by three commissions, as of gaol-delivery, *oyer* and *terminer*, and the peace, if it be returned at a session holden before them, and the record be made up, as upon all three commissions, if they have jurisdiction to take the indictment but by one of those, it is good, tho not enabled to take it by the other. *9 H. 7. 9. a.*

[1] Arch. C. P. 37, (by Welsby, 1846,) 3 Burn's J. 869, edit. 1845; R. v. Fearny, 1 Leach, 425; 4 Went. Pl. 41, 105, 132, 150, 174, 222; 6 Id. 1, 357, 373; Cr. Circ. Com. 327; 2 Hawk. c. 25, s. 118, 126, 127; Salk. 605; 2 Str. 865; R. v. Warre, 1 Id. 698; R. v. Hall, 1 T. R. 320.

[2] 3 Burn's J. 870; Dean v. The State, Martin & Yerger, 127; State v. Zule, 5 Halst. 348; McClure v. The State, 1 Yerger, 208.

[3] See Seef v. Com. 8 Leigh, 721; State v. Lane, 4 Iredell, 113.

[4] The State v. Sutton, 1 Murph. N. C. Rep. 282.

Tent' coram justiciariis ad pacem, without saying *necnon ad divers' felonias, &c. audiend' & terminand' assignatis*, is not good to remove an indictment because tho that clause be usually added to all commissions of the peace, yet there are not thereby justices of *oyer* and *terminer*, and that clause ought to be added to their return, because without that clause they cannot proceed by indictment. 22 E. 4. 12. b. 2 R. 3. 9. a. b.

And altho in all commissions of *oyer* and *terminer*, [167] gaol-delivery, and of the peace, there be some that are of the *quorum*, without which there can be no session held, yet in the caption there need not be any mention, whether any of them, or which of them are of the *quorum*, but generally as before, for it is sufficient, if *de facto* the session be held before him or them that are of the *quorum*, tho not so mentioned in the return, and so is the usual course.

But it seems, that if an act of parliament doth expressly limit, that such or such an offense shall be heard and determined before two or more justices of the peace, &c. whereof one to be of the *quorum*, the caption of such an indictment of such an offense ought to mention, whereof *A. &c.* is of the *quorum*, as is used in the return of orders made by two justices touching bastard children upon the statute of 18 Eliz. cap. 3. because the act of parliament precisely limits one to be of the *quorum*, and therefore must be pursued.

6. It must return, that the indictment was made *per sacramentum*. [5]

7. It must name the jurors that presented the offense, and therefore a return of an indictment or presentment *per sacramentum A. B. C. & D. & aliorum* is not good, for it may be the presentment was by a less number than twelve, in which case it is not good. H. 41 Eliz. B. R. Croke, n. 16. *Clyncard's* case, p. 654. and it seems to me, that all the names of the jurors ought to be returned; for the party indicted may have an exception to some or one of them, as that he is outlawed, in which case the indictment may be quashed by plea, tho there be twelve besides without exception; for possibly that one, who is not *legalis homo*, may influence all the rest, and so vitiate the whole indictment.

8. They must be returned to be *probi & legales homines*, and *de comitatū prædicto*, and this holds as well in the case of the coroner's inquest, as of other indictments or presentments. P. 20 Jac. B. R. Croke 2. *Oily's* case, p. 635.

[5] 1 Keb. 329; 2 Id. 676; 1 Sid. 140; 3 Mod. 202; Hawk. c. 25. s. 126; Bac. Abr. Indict. 1; 3 Burn's J. 871.

9. It seems requisite also to add this clause, *onerati & jurati ad inquirendum pro domino rege & pro corpore comit' prædict'*; and if it be a presentment by the grand jury of a liberty, *ad inquirend' pro domino rege & pro libertate de S. vel rapd de S.* [168]

10. If it concludes *qui dicunt*, and says not *super sacrament'*, &c. or *præsentatum existit*, and says not *per sacramentum*, &c. *præsentatum existit*, it shall be quashed, for their presentment must be upon oath, and so returned; so ruled *T. 23 Car. 1. B. R.*

And thus far for the caption of the indictment, where, *note 1.* That if the caption be faulty in the form, yet the same term it may be amended by the clerk of the assises, or the peace, but not in another term.

2. But in another term, the clerk that returns it shall be fined for his informal return.[6]

[6] In *R. v. Aylett*, 6 A. & Ell. 247. a. it was objected upon error that the caption did not contain the names of any of the jurors, the House of Lords, after consulting the judges, affirmed the judgment. And in *R. v. Marsh*, 6 Id. 236, the Chief Justice agreed that the insertion of the names is not necessary. See *R. v. Davis*, 1 C. & P. 470; 2 Str. 702; 4 East, 174. In *Gresson v. State*, 5 How. Miss. Rep. 33, it appeared by the record, that a foreman was appointed, and the indictment was returned signed by him, and the caption stated that the grand jury returned the bill into court by their foreman, it was held sufficient. It is not necessary, in New Jersey, to aver the specific qualifications of the grand jurors, if they be described as good and lawful men; nor that the grand jurors were summoned and reckoned as such. *State v. Price*, 6 Halst. 203; *State v. Jones*, 4 Id. 457. In New York, if the caption states that the grand jury were sworn and charged, without saying, then and there, the judgment will be arrested. *The People v. Guernsey*, 3 Johns. 365. The caption must show that the venire facies was returned, and from whence the jury came, or it will be bad on demurrer. *State v. Hunter*, Peck's Term Rep. 166; *State v. Fields*, Id. 140; *State v. Williams*, 2 McCord, 301; *Tipton v. State*, Peck Rep. 8; *Cornell v. State*, Martin & Yerger, 147; *Wordsides v. State*, 2 How. Miss. Rep. 655; Chit. C. L. 327. A statement of the term in the caption thus, "Fall Term, 1822," and in the body of the indictment, charging the time of the offence, in these words, "on the first day of August, in the present year," was held good; and it was said that there was no necessity for stating any time in the caption of an indictment found in the County or Supreme Court. *State v. Haddock*, 2 Hawks. 461; see *State v. Harris*, 2 Halst. 361; *R. v. Morgan*, 1 Ld. Raym. 710. As to the mode of rectifying mistakes in the caption, see *R. v. Justices of Middlesex*, 5 B. & Ald. 1113; *R. v. Marsh*, 6 Ad. & Ell. 236; *Pennsyl. v. Bell*, Add. 173; *State v. Jones*, 4 Halst. 457; see generally *State v. Brickell*, 1 Hawks. 354; *State v. Gilbert*, 13 Verm. Rep. 647; *State v. Smith*, 2 Harrington, 532; *U. S. v. Insurgents*, 2 Dall. 342; *People v. Jewett*, 3 Wend. 319; *State v. Warden*, N. C. Term Rep. 270; 1 Saund. Rep. 248, 249.

CHAPTER XXIV.

CONCERNING THE BODY OF THE INDICTMENT IN CASES CAPITAL, AND THE SEVERAL PARTS THEREOF, AND THE FORMS REQUISITE THEREIN.

THIS is a large and uncertain title, and hard to be reduced to any certain orders; 1. Because the parts of an indictment are many. 2. The strictness required in indictments is great, because life is in question. 3. Therefore very nice and slender exceptions have been of latter ages allowd, and they have been with too much facility quashed and reversed. 4. The circumstances of facts and crimes are very various.

Yet I shall endeavour to reduce this title to as much certainty, and as good a method as I can, confining myself to capital causes, tho there be many things that will arise equally applicable to causes of an inferior nature.

An indictment is nothing else but a plain, brief, and [169] certain narrative of an offense committed by any person, and of those necessary circumstances, that concur to ascertain the fact and its nature; and therefore I shall consider 1. Some generals, that concern indictments in general. 2. I shall consider the several parts of indictments in their order.

Among these generals these will come to be considered, that follow.

I. Regularly, every indictment ought to be in *Latin*, as all pleadings in the courts of law ought to be, and it is of excellent use, because it being a fixed, regular language, it is not capable of so many changes and alterations, as happen in vulgar languages.(a)

If there be a proper *Latin* word for any offense or thing containd in an indictment, it may not be supplied with general words, and an *Anglicè*.

Therefore an indictment; *quodd exercuit quasdam diabolicas artes*, *Anglicè* witchcraft, was quashed, because there is a proper *Latin* word for it; *viz. Incantatio. M. 2 Car. B. Dr. Lamb's case.(b)*

(a) This is now altered by 4 Geo. 2. esp. 26, 6 Geo. 2. cap. 6. which requires all indictments, &c. to be in the *English* tongue; for notwithstanding the excellency of the use here mentiond by our author, it was thought to be of much greater use and importance, that they should be in a language capable of being known and understood by the parties concerned, whose lives and liberties were to be affected thereby.

(b) *Noy 85. Latch. 156. W. Jones, 143.*

Regularly, false *Latin* doth not vitiate an indictment, if yet the indictment be reasonably intelligible, 5 *Co. Rep.* 121. *a. Long's case*, *M.* 30 & 31 *Eliz. Croke*, *n.* 3. *B. R. Brickell's case*, (c) as *præfato reginæ*, where it should be *præfatæ*.

But if the words be words of art, and by omission or misplacing of letters become insignificant, they vitiate the indictment, as *burgariter* for *burglariter*, *feloniter* for *felonicè*, *murdredavit* for *murdravit*; but *burgulariter* hath been held good, 4 *Co. Rep.* 39. *b. Brook's case*, *ibid.* 41. *b. Haydon's case*, 5 *Co. Rep.* 121. *a. Long's case*. *H.* 45 *Eliz. B. R. Croke*, *n.* 15. *Ryle's case*. (d)

So if it make the indictment insensible or uncertain, as if *A.* and *B.* be indicted for stealing, *felonicè cepit* [170] & *asportavit*, where it should be *ceperunt*, it shall be quashed, *P.* 42 *Eliz. B. R. Lane's case*; (e) so in an indictment of murder, the stroke laid in *sinistro bracio*, where it ought to be *brachio*, for it appears not where the wound was, the words being insensible. *T.* 31 *Eliz. B. R. Webster's case*, (f) [1]

Abbreviations, that are usual, are allowable in indictments, as well as in other pleadings, and shall be construed to the best advantage for the maintaining of the indictment, as if an indictment be maintainable upon one statute or more, a conclusion *contra formam statuti in hujusmodi casu editi & provis.* shall be construed singularly or plurally, as makes best for the maintenance of the indictment. (g)

Figures to express numbers are not allowable in indictments, tho sometimes literal numbers be allowable in returns, but in indictments the numbers, whether cardinal or ordinal, must be expressed in *Latin*. [2]

II. An indictment grounded upon an offense made by act of parliament must by express words bring the offense within the substantial description made in the act of parliament, and those circumstances mentiond in the statute to make up the offense

(c) *Cro. Eliz.* 108. (d) *Cro. Eliz.* 990. (e) *Cro. Eliz.* 754.

(f) By the name of *Goelen's case*? *Cro. Eliz.* 137.

(g) This is also alterd by 4 *Geo. 2. cap.* 26. 6 *Geo. 2. cap.* 6. which prohibits all abbreviations in indictments, &c.

[1] See *State v. Whitney*, 15 *Verm.* 298; *State v. Halder*, 2 *McCord*, 377; *Simmons v. Com.* 1 *Rawle*, 142; *State v. Duestoe*, 1 *Bay.* 377; *State v. Carter*, *Conf. Rep.* 210; 2 *Bay.* 140; *People v. Warner*, 5 *Wend.* 271; *State v. Moses*, 2 *Dev.* 450; *State v. Brady*, 14 *Verm.* 353.

[2] But see *R. v. Mason*, 1 *East*, 180. It is more proper to write the figures at length than in Arabic characters, but the contrary will not vitiate. *State v. Raiferd*, 7 *Porter*, 101; *State v. Hodgeden*, 3 *Verm.* 481; *Peck*, 165. As to interlineations, see *R. v. Davis*, 7 *C. & P.* 319.

shall not be supplied by the general conclusion *contra formam statuti*.

And so it is, if an act of parliament oust clergy in certain cases, as murder *ex malitiâ præcogitatâ*, robbery in or near the highway, stabbing one not having struck first, nor having a weapon drawn, tho the offenses themselves were at common law, yet because at common law within clergy, they shall not be ousted of clergy, tho convicted, unless these circumstances, as *ex malitiâ præcogitatâ*, or *prope altam viam*, &c. be expressed in the indictment.[3]

But where an offense is made felony, or otherwise punishable by act of parliament, tho the indictment must take in the circumstances, which in the body of the act make up the offense, yet if by a proviso in the same statute, or by [171] any subsequent statute some cases or circumstances are exempted out of the act, the indictment need not mention and qualify the offense, so as to exempt it out of the proviso, but the party shall have advantage of the proviso by pleading *not guilty*, and in the same manner shall have advantage of the subsequent statute to excuse him by virtue of the statute of 21 Jac. cap. 4.[4]

If a statute prohibit any act to be done, and by a substantive clause gives a recovery by action of debt, bill, plaint, or information, but mentions not indictment, the party may be indicted upon the prohibitory clause, and thereupon fined, but not to recover the penalty, as upon the statute of 3 Jac. cap. 5. prohibiting recusants to baptize their children by a popish priest. *H. 7 Car. B. R. per Cur'*, but then it seems the fine ought not to exceed the penalty. *P. 22 Car. B. R. College of Physicians, vide tamen M. 20 Jac. B. R. Croke, n. 4. Castle's case, contra.(h)[5]*

(h) Cro. Eliz. 644.

[3] 1 Leach, 246; 1 East, P. C. 419; *Ld. Raym.* 791; *Burr.* 679; 1 T. R. 222; *State v. Gibbons*, 1 South. 51; *State v. Calvin, Charlton*, 151; *U. S. v. Lancaster*, 2 McClean's Rep. 431; *Com. v. Howe*, 15 Pick. 231; *Journey v. State*, 1 Missouri, 304; *Resp. v. Tryer*, 3 Yeates, 451; *Updegraff v. Com.* 6 S. & R. 5; 3 id. 273; 1 Rawle, 290; 5 id. 64; 3 Penn. Rep. 180; 3 Watts, 330; 7 id. 199; 5 Whart. 357; 19 S. & R. 426; 2 Stew. 11; 3 McCord, 442; 1 Bail. 144.

[4] 1 Siderf. 303; 1 Lev. 26; *Burr.* 148; id. 1087; *Str.* 1101; 1 East, 648; 5 T. R. 83; 1 Bl. Rep. 230; 2 Hawk. c. 25, s. 112; *Bec. Abr. Indict. H.* 2; *Mathews v. State*, 2 Yerger, 223; *State v. Adams*, 6 N. Hamp. 533; *State v. Sommers*, 3 Verm. 156; but see *Reynolds v. State*, 2 N. & McCord, 365; *State v. Norman*, 2 Dev. 222; *State v. Loftin*, 2 Dev. & Bat. 31; *Com. v. Thurlow*, 24 Pick. 374; *State v. Webster*, 5 Halst. 293; *State v. Craft*, 1 Walker, 409.

[5] *R. v. Boyall*, *Burr.* 832; *R. v. Wright*, id. 543; *R. v. Jones*, *Str.* 1146; *R. v. Harris*, 4 T. R. 205; *Moore v. State*, 9 Yerger, 353.

But if the act be not prohibitory, but only that if any person shall do such a thing, he shall forfeit 5*l.* to be recovered by action of debt, bill, plaint, or information, he cannot be indicted for it, but the proceeding must be by action, bill, plaint, or information. *P. 6 Car. B. R. Day's case.*[6]

If a man be indicted for an offense, which was at common law, and concludes *contra formam statuti*, but in truth it is not brought by the indictment within the statute, it shall be quashed, and the party shall not be put to answer it as an offense at common law.

As if a man be indicted for drawing his dagger in the church upon *J. S. contra formam statuti*, viz. § *E. 6. cap. 4.* but omits these words *with an intent to strike*, the indictment shall be quashed, and the party not put to answer the assault at common law. *P. 33 Eliz. B. R. Croke, n. 23. Penhallo's case.*(*g*)

So if a man be indicted for a riotous and forceable entry *contra formam statuti*, viz. 8 *H. 6. cap. 9.* and the statute is misrecited, he shall not be put to answer the offense at common law, but the indictment shall be quashed. [172]

M. 35 & 36 Eliz. B. R. Croke, n. 10. Hall and Gaven.(*h*) *M. 41 Eliz. B. R. Croke, n. 10. Eden's case.*(*i*) yet vide *M. 10 Car. Holme's case.*(*m*) A man indicted for felonious burning of a house, upon *not guilty* pleaded a special verdict was found, it was adjudged no felony, as the case was found, yet upon the same indictment he was adjudged to the pillory, and fined 500*l.* and bound to his good behaviour, but *quære* of that case, for it seems unreasonable, because being tried for felony, he hath not those advantages for his defense, as if he were indicted only for trespass;(n) *M. 10. Car. B. R. Croke, n. 3. vid. 2 H. 7. 10. b.*

If a statute be particular, it must be recited in the indictment, and proved by an examined copy upon the trial.[7]

But if a man be indicted *quodd furatus est*, and says not *felonice*, this indictment imports but a trespass, and the offender may be put to answer it as a trespass. 2 *H. 7. 10. b. 18 E. 4. 10 b.*

And so it seems, if a man be indicted at a leet, *quodd felonice rapuit* such a woman, and this indictment is removed into the king's bench; because the leet hath no jurisdiction to take an

(i) *Ora. Elis. 231.*

(l) *Ora. Elis. 697.*

(k) *Ora. Elis. 307.*

(m) *Ora. Car. 376.*

(n) For instance, he could not have the assistance of counsel.

[6] *R. v. Robinson, Burr. 805; R. v. Buck, Str. 679; Com. v. Evans, 13 S. & R. 326.*

[7] 2 *Hawk. c. 25, s. 103; Bac. Abr. Indict. H. 2; Gilb. Ev. 12; R. v. Shaw, 12 East. 479; State v. Cobb, 1 Dev. & Bat. 115; Goheen v. Sears, 7 Conn. 92.*

indictment of rape as a felony, he shall not be put to answer it as a felony, but shall be fined as for a trespass, because as a trespass the leet may enquire of it. 6 H. 7. 5. a.

If it be a general statute, it need not be recited, but it is sufficient to conclude *contra formam statuti in hujusmodi casu edit' & provis'*, for the court ought to take notice of it, and all penal statutes, that induce a forfeiture to the king, or make a felony or treason are general statutes, because it concerns the king; but if a general statute be recited in an indictment, and be misrecited in a point material, and conclude *contra formam statuti prædicti*, it is fatal, and the indictment shall be quashed, [8]

but it seems, that if it conclude generally *contra formam statuti in hujusmodi casu edit' & provis'*, it is good, for the court takes notice of the true statute, and will reject the misrecital as surplusage. M. 7 Car. B. R. Croke, n. 14. Barn's case(o) in maintenance, and M. 8 Car. B. R. per Jones super stat. de cottages.(p)

1. If an act of parliament making a felony or other offense be but temporary, and made perpetual by another statute, the indictment concluding *contra formam statuti* is good.

2. If the former statute be discontinued, and revived by another statute, the best way is to conclude *contra formam statutorum*, M. 31 & 32 Eliz. B. R. Mill's case, tho there is good opinion, that it is good enough to conclude *contra formam* of the statute, as in case of the statute of 5 E. 6. of ingrossing, 27 H. 8. for usury, and 5 Eliz. for perjury, which were discontinued and revived, yet the indictments good concluding *contra formam* of the first statute. T. 9 Jac. Rot. 124. C. B. Westwood's case.

3. If one statute be relative to another, as where the former makes the offense, the latter adds the penalty, as the statutes of 1 and 23 Eliz. the indictment ought to conclude *contra formam statutorum*. P. 42 Eliz. B. R. Croke, n. 6. Dingly and Moore.(q)[9]

(o) Cro. Car. 232.

(p) 31 Elis. cap. 7.

[8] Butler v. State, 2 McCord, 383; State v. Petty, Harp. 59.

[9] As to indictments for offences created by statute, see Broughton v. Moore, Cro. Jac. 142; R. v. Morgan, Str. 1006; 1 Saund. 135, b.; Lea v. Clarke, 2 East, 333; R. v. Jurkes, 8 T. R. 536; R. v. Warshaner, 1 Mood. C. C. 466; R. v. Davis, Leach, 556; R. v. Turner, 1 Mood. C. C. 239; R. v. Coke, 2 East, P. C. 617; Leach, 123; R. v. Douglass, 1 Camp. 212; R. v. Compton, 7 C. & P. 139; R. v. Loom, 1 Mood. C. C. 180; R. v. Puddifoot, id. 247; R. v. Craven, R. & R. 14; R. v. Beany, id. 416; R. v. Chalkley, id. 258; R. v. Hunter, 2 Leach, 624; 2 East, P. C. 928; R. v. Barton, 1 Mood. C. C. 141; R. v. Thompson, 2 Leach, 910; R. v. Boardman, 2 M. & Rob. 147; Spiers v. Parker, 1 T. R. 141; R. v. Earnshaw, 15 East, 456; R. v.

III. Touching the joining of persons and offenses in one indictment.

If there be one offender and several capital offenses committed by him, they may be all contained in one indictment, as burglary, and larciny: Larcinies committed of several things, tho at several times, and from several persons, may be joined in one indictment.[10]

(9) *Cro. El.* 750.

Jervis, 1 *id.* 643; *R. v. Batten*, 6 *T. R.* 559; *R. v. Baxter*, 5 *id.* 83; *R. v. Matters*, 1 *B. & Ald.* 362; *R. v. Pearos*, *R. & R.* 174, *id.* 321; *R. v. Hall*, 1 *T. R.* 320; *Steel v. Smith*, 1 *B. & Ald.* 94; *R. v. Smith*, *Dougl.* 441; *R. v. Richards*, 8 *T. R.* 637; *U. S. v. Batchelder*, 2 *Gall.* 15; *State v. Hickman*, 3 *Halst.* 299; *State v. Little*, 1 *Verm.* 331; *Whitting v. State*, 14 *Connect.* 487; *Com. v. Searle*, 2 *Binn.* 339, 6 *id.* 182; *U. S. v. Sharp. et al. Peters* *C. C. R.* 118; *U. S. v. Coffin*, 1 *Sumner*, *C. C. R.* 194; *U. S. v. Elliott*, 3. *Mason*, *C. C. R.* 156; *U. S. v. Clark*, 1 *Gall. C. C. R.* 437; *State v. O'Bannon*, 1 *Bailey*, 144; *State v. Brown*, 4 *Port.* 410; *Hamilton v. Com.* 3 *Penn.* 142; *State v. Casados*, 1 *N. & McC.* 91; *Butler v. State*, 3 *McCord*, 383; *State v. Raines*, *id.* 533; *People v. Phelps*, 5 *Wend.* 9; *U. S. v. Vickery*, 1 *Haz. & J.* 427; *State v. Bougher*, 3 *Blackf.* 307; *State v. Cantrell*, 2 *Hill*, *S. C.* 389; *State v. Chestwood*, *id.* 459; *U. S. v. Wilson*, 1 *Bald.* 78; *Com. v. Macubay*, 2 *Dana*, 79; *State v. Plunket*, 2 *Stew.* 11; *U. S. v. Gooding*, 12 *Wheat.* 460; *State v. Petty*, *Harper*, 59; *Sneed v. Com.* 6 *Dana*, 339.

[10] If they be joined in one count, it will be bad for duplicity. *Arch. C. P.* 50; *Stark. C. P.* 272; 3 *Burn's J.* 866; *Com. v. Gable*, 7 *S. & R.* 423. And it is doubtful whether they should be charged in different counts; for if an objection in such a case be made before the defendant has pleaded, or the jury are charged, the judge in his discretion may quash the indictment; or if it be not discovered until after the jury are charged, the judge may put the prosecutor to his election on which charge he will proceed. *R. v. Young*, 3 *T. R.* 106; but it is no objection in arrest of judgment. 3 *T. R.* 98; *Carlton v. Com.* 5 *Metcalf*, 532; see *Kane v. People*, 9 *Wend.* 203; *Carey v. State*, 3 *Porter*, 186; *Harman v. Com.* 12 *S. & R.* 69; *Com. v. Gillespie*, 7 *id.* 476; *R. v. Dunn*, 1 *Mood. C. C.* 146; *R. v. Smith*, *id.* 295; *R. v. Ellis*, 6 *B. & C.* 145; *R. v. Gough*, 2 *M. & Rob.* 71; *R. v. Smith*, 3 *C. & P.* 412; *R. v. Galloway*, 1 *Mood. C. C.* 234; *R. v. Madden*, *id.* 277; *R. v. Flower*, 3 *C. & P.* 413. A defendant may be charged as accessory before the fact in one count, and as accessory after the fact in another count, to the same felony, without putting the prosecutor to his election, and may be convicted on both counts. *R. v. Blackston*, 8 *C. & P.* 43. So he may be indicted as principal in the first degree in one count and principal in the second degree in another count. *R. v. Gray*, 7 *C. & P.* 174; *Com. v. Hope*, 23 *Pick.* 1. And a receiver may be indicted as accessory in one count and for a substantive felony in another count; and the judge will not put the prosecutor to his election, if it appear that there is only one offence, and the joinder of counts cannot prejudice the defendant. *R. v. Austin*, 7 *C. & P.* 796; *R. v. Hartall*, *id.* 475; *R. v. Wheeler*, *id.* 170. So a felony may be charged in different ways in several counts, in order to meet the facts of the case. *R. v. Eggington*, 2 *B. & P.* 508; *Kane v. People*, 9 *Wend.* 203; *State v. Hogan*, *Charlton*, 474; see *State v. Early*, 3 *Harring.* 561; *State v. Haney*, 2 *Dev. & Bat.* 390; *U. S. v. Dickinson*, 2 *McClellan's C. C. R.* 325. Indictments for misdemeanors may contain several counts for different offences, provided the judgment upon each be the same. *R. v. Young*, 3 *T. R.* 98, 106; *R. v. Towle*, 2 *Marsh.* 466; *R. v. Johnson*, 3 *M. & S.* 539; *R. v. Kingston*, 8 *East*, 46; *R. v. Benfield*, *Burr.* 984; *R. v. Jones*, 2 *Camp.* 131; *State v. Freels*, 3 *Hum.* 228. In Maryland, Alabama, and South Carolina, it has been held, that felonies and misdemeanors, when relating to the same subject-matter, may be joined. *Buck v. State*, 2 *Harr. & Joh.* 426; *State v. Cole-*

If there be several offenders, that commit the same offense, tho in law they are several offenses in relation to the several offenders, 21 E. 4. yet they may be joined in one indictment, as if several commit a robbery, or burglary, or murder.

And so it is, if the offenses are of several degrees, but dependent one upon another, as the principal in the first degree, and the principal in the second degree, *viz. present, aiding, and abetting* the principal, and accessory before or after.

IV. Touching the joining of several offenses of the [174] same nature, but distinctly committed by several offenders, some have been ruled insufficient, as an indictment of several persons, *quodd non escourarunt fossata separalia ante separalia sua pomaria*, quashed in 23 Car. 1. B. R. so of several officers, *quodd colore separaliū officior' suorum separalitèr extorsive ceperunt*, &c. M. 33 & 34 Eliz. B. R. *Lake's case in Hughe's Rep.* and so if two are indicted for using a trade not being bound apprentice, it is not good. P. 16 Car. 1. B. R. *Brooke's case.*(r)

But yet in 21 T. 21 Jac. B. R. *A. B. C. and D.* were indicted for erecting four several inns *ad commune nocumentum*, it was ruled, that for several offenses of the same nature several persons may be indicted in the same indictment, but then it must be laid *separalitèr exererunt*, and for want of that word (*separalitèr*) the indictment was quashed.

And it is common experience at this day, that twenty persons may be indicted for keeping disorderly houses, or bandy-houses, and they are daily convict upon such indictments, for the word *separalitèr* makes them several indictments.[11]

(r) 2 R. A. 78. pl. 6.

man, 5 Porter, 52; *State v. Montague*, 2 McCord, 287; *State v. Gaffney*, Rice, 431; see 3 Burn's J. 862.

[11] Though they have acted separately, yet if the grievance is the result of the acts of all jointly, all may be indicted jointly for the offence. *R. v. Trafford*, 1 B. & Ad. 874; *R. v. Young*, 3 T. R. 98; *R. v. Benfield*, Burr. 985; *Kane v. People*, 9 Wend. 203. But two or more cannot be jointly indicted for perjury. *R. v. Phillips*, Str. 921; or for seditious, or blasphemous words, or the like, because such offences are in themselves several. Several parties cannot be indicted jointly for exercising their trade without having served an apprenticeship. *R. v. Atkinson*, Salk. 382; *R. v. Weston*, Str. 623. In conspiracy and riot, where one cannot be indicted alone, the acquittal of those charged in the same indictment with him as co-defendants, must extend to him. *R. v. Kinnusly*, Str. 193; 12 Mod. 262; Salk. 593; 13 East, 412; *Ld. Raym.* 484; *State v. Allison*, 3 Yerger, 498; *People v. Howell*, 4 Johns. 296; *Turpin v. State*, 6 Blackf. 72. Upon an indictment against two for a joint and single offence, as stealing in a dwelling-house, both or either may be found guilty, but they cannot be found guilty of separate parts of the charge; and if they be found guilty separately, judgment cannot be passed upon one unless a pardon be obtained or a *nolle prosequi* be en-

CHAPTER XXV.

CONCERNING THE FORMS OF INDICTMENTS IN PARTICULAR, AND THE SEVERAL PARTS THEREOF.

THE most considerable parts of an indictment in capital offenses are, 1. The name and addition of the party offending. 2. The day and time of the offense committed. 3. The place where it was committed. 4. Upon or against whom committed. 5. The manner of the commission of it. 6. The fact itself and the nature of it. 7. The conclusion.

This is the grammatical order, wherein things are set down in the indictment, and upon these parts most [175] of the considerations and observations touching indictments do arise, and those that are not reducible to these heads, are partly observed before, and shall be more fully prosecuted in the end of this chapter.

I. As to the name and addition of the party indicted, this regularly ought to be inserted, and inserted truly in every indictment.

But if the party be indicted by a wrong christian name, surname, or addition, and he plead to that indictment *not guilty*, or answers to that indictment upon his arraignment by that name, he shall not be received after to plead *misnomer*, or falsity of his addition, for he is concluded and estopped by his plea by that name, and of that estoppel the gaoler and sheriff, that doth execution, shall have advantage.

M. 16 Jac. and P. 17 Jac. B. R. Debt was brought against Sir *Francis Fortescue* knight and baronet, and he appeared, and judgment given against him, ruled 1. That he shall never

tered as to the other. *R. v. Hempstead, R. & R. 344.* So if two be charged jointly with receiving stolen goods, a joint act of receiving must be proved; proof that one received in the absence of the other and afterwards delivered to him will not suffice. *R. v. Messingham, 1 Mood. C. C. 257.* But where several are indicted for burglary and larceny, one may be found guilty of burglary, and the others of the larceny only. *R. v. Butterworth, R. & R. 520; see R. v. Turner, 1 Sid. 171.* It has been held in Massachusetts that parties to the crime of adultery may be indicted jointly. *Com. v. Ellwell, 2 Metc. 190.* Misjoinder of defendants may be made the subject of a demurrer, motion in arrest of judgment, or writ of error; or the court will in general quash the indictment. But where there are different counts against different persons in the same indictment, though a ground for moving to quash the indictment, is, it seems, no cause of demurrer. *R. v. Kingston, 8 East, 41;* provided the counts be otherwise such in substance as may be joined. See *U. S. v. Marchant, 12 Wheat. 480; 6 Cond. 588; 3 Burn's J. 860.*

assign for error, that he was no baronet, tho baronet be parcel of the name. 2. If execution be sued against him by the name of Sir *Francis Fortescue* knight and baronet, and he brings false imprisonment against the sheriff, the sheriff shall have advantage of this estoppel, adjudged.(a)

Therefore he, that will take advantage of the *misnomer* of his christian name, addition, or surname, must do it upon his arraignment, and the entry must be special, viz. *super quo venit Robertus Williams, qui indictatus est per nomen Johannis Williams, & dicit quodd ubi in indictamento supponitur, quodd quidam Johannes Williams vi & armis, &c. ipsius nomen est Robertus & non Johannes*; for, if he should say *venit prædictus Johannes Williams*, he concludes himself, and cannot plead, that his name is *Robert*, and so I have known it ruled against the book of 1 *E. 4. 2. b.*

The misnaming of the surname of the offender in an appeal is a good plea in abatement, but tho the surname be mis-
[176] taken in an indictment, yet it shall not abate. 1 *H. 5. 5. b. per Hankford. Stamf. P. C. Lib. III. cap. 18. tamen quære.*

But the mistake of the christian name is pleadable, as well in case of an indictment, as an appeal, and the party shall be dismissed from that indictment. 11 *H. 4. 41. b. Coron. 88. Stamf. P. C. ubi supra*, but by *Rolf. 3 H. 6. 26. a.* it is no plea in an indictment.(b)

But the safest way is to allow his plea of *misnomer* both as to his surname and as to his christian name, for he that pleads *misnomer* of either, must in the same plea set forth what his true name is, and then he concludes himself, and if the grand jury be not discharged, the indictment may presently be amended by the grand jury, and returned according to the name he gives himself.

By the statute of 1 *H. 5. cap. 5.* in all indictments, &c. the party indicted ought to have the addition of his mystery, degree, place, and county.

Therefore, if the party indicted have no addition, or a false addition, he may upon his arraignment except to the former, and plead to the latter.

And if he be outlawed upon such indictment, where there is no addition, or a false addition, he may avoid it by a writ of error, &c.

But altho there be no addition, yet if he appear, and plead not guilty without taking advantage of that defect, he shall never allege the want of addition to stop his trial or judgment,

(a) 2 *Rel. Rep.* 50, 88.

(b) The words of the book are, it is no plea in felony.

for by such his appearance and pleading to issue the indictment is affirmed, and the want of addition salved, and the statute satisfied. *H. 18 Jac. B. R. Croke, n. 5. Johnson's case, (c)* adjudged.

The addition required by the statute is of his degree, as *Yeoman, Gent. Esq;* of his mystery, as *husbandman, sailor, spinster, &c.* therefore if the addition be only general, as servant, farmer, citizen, *9 E. 4. 48. a.* or of crimes or misdemeanors only, as extortioner, vagabond, heretic, *22 E. 4. 1. a.* these are no good additions.

The addition ought to be to his substantive name, not only to the *alias dictus*. *M. 33 & 34 Eliz. Croke, [177] n. 11. Leke's case (d)* as *A. B. alias dictus A. C. butcher*, because regularly the addition refers to the last antecedent, and upon the same reason it is, if the indictment run *Sibilla B. nuper de C. uxor Johannis B. nuper de C. spinster*, because *spinster* is an addition applicable to the husband, as well as to the wife; but an indictment of *John B. vir, Emelin B. nuper de C. yeoman* is good, because *yeoman* is not applicable to a woman, but to a man. *P. 31 & 32 H. 8. Dyer 46, 47. adjudged, and 4 H. 6. 4. b.*

Single woman is a good addition, *14 E. 4. 7. b.* so is *widow*, *10 H. 6. 21. a.* so is *uxor J. S.* adjudged, *P. 42 Eliz. B. R. Eleanor Gower's case.*

An indictment against a peer of the realm is good without an addition, because no process of outlawry lies against him. *M. 31 & 32 Eliz. B. R. Croke, n. 15. Lord Dacre's case. (e)*

If several persons be indicted for one offense, *misnomer* or want of addition of one quasheth the indictment only against him, and the rest shall be put to answer, for they are in law as several indictments, and so in trespass. *7 E. 4. 10. b.*

Because the titles of *misnomer* and addition are general titles, whereof much is said in our books, as well in cases of civil suits as indictments, this shall suffice in this place touching this part of the indictment. [1]

(c) *Cro. Eliz.* 609.

(d) *Cro. Eliz.* 249. 198.

(e) *Cro. Eliz.* 148.

[1] The inhabitants of a parish may be indicted for not repairing a highway, without naming any of them. *2 Roll. Abr.* 79; see *Com. v. Demuth*, *12 S. & R.* 369; *R. v. The Birm. & Glou. R. W. Co.* *3 Ad. & El.* 223; but *contra, Com. v. Swift Run Gap Turnp. Co.* *2 Virg. C.* 362; *State v. Great Works*, *20 Maine*, 41. A second christian name cannot be given to a man after an *alias dictus*; see *R. v. Newham, Id. Raym.* 563; *Scott v. Soans*, *3 East*, 111; but if a man has acquired two names at baptism, or one at baptism and another by confirmation, he may be indicted by both; and if these be misplaced, as *James Richard* for *Richard James*, it is a misnomer. *Jones v. Macquillon*, *5 T. R.* 195; *1 Camp.* 479. Held in New York that the law never recognized more than one christian name, and

II. Touching the time, *viz.* the year and day, wherein the fact was committed; this is necessary to be contained in the indictment.

Tho the day be inserted, but not the year, the indictment is insufficient, and it shall not be supplied by intendment of (*ultimo præterito*), unless it be so exprest, but if it be so exprest, it is sufficient ascertaining the year by the day of the sessions. *Lamb.* 49.

If the sessions be held the 20 day of *May*, and the indictment suppose the offense to be the 10 day of *Maii* [178] *ultimi præteriti*, it relates to the month, if *ultimo*

therefore when the middle names of the defendant were omitted, the omission was right. *Roosevelt v. Gardiner*, 2 *Cowen*, 463. But it was held a misnomer in Massachusetts, when T. H. P. was indicted by the name of T. P. *Com. v. Perkins*, 1 *Pick.* 386. If there be a doubt which one of two names is the defendant's real surname the second may be added after an *alias dictus*, thus "John Styles, otherwise called John Smith." *Bro. Abr. Misnom.* 37. If the name be mis-spelt, but *idem sonans*, it is no error. 16 *East*, 110; *Petrie v. Woodward*, 3 *Caines' Rep.* 219; *State v. Upton*, 1 *Dev.* 513. Where surnames with a prefix to them, are ordinarily written with an abbreviation, it is sufficient to write them so in an indictment. *State v. Kean*, 10 *N. Hamp. R.* 347. Where a man is in the habit of using initials for his christian name, and he is so indicted, and the fact whether he is so known is put in issue, and he is convicted, the court will not interfere. *City Court v. King*, 4 *McCord*, 487. When a man by his own conduct renders it doubtful what his real name is, he is answerable for the consequences. *Newton v. Maxwell*, 2 *Crom. & Jer.* 215. If the prisoner's name be unknown and he refuse to disclose it, he may be described as a person whose name is to the jurors unknown, but who is personally brought before them by the keeper of the prison. *R. & R.* 469. When father and son have the same name, they should be distinguished by the "elder," and the "younger." 2 *Hawk. C.* 25, s. 70, *id. c.* 23, s. 106, *Salk.* 7. It has however been said that junior, is no part of the name. *Com. v. Perkins*, 1 *Pick.* 386; *State v. Grant*, 22 *Maine*, 171; but see *State v. Vittum*, 9 *N. Hamp.* 519; *Jackson, ex dem. Pell v. Provost*, 2 *Caines* 165. Defendant must take advantage by plea in abatement, of a misnomer of his christian name; 2 *Hawk. c.* 25, s. 68; and of his surname, *R. v. Shakespeare*, 10 *East*, 83. The addition should be added after the first name, and not after the *alias dictus*. 2 *Ins.* 699. *R. v. Semple*, 1 *Leach*, 420. Servant, is not a good addition. *R. v. Cheekets*, 6 *M. & S.* 88. Addition of "lottery vendor," when defendant was a lottery broker, held bad. *State v. Bishop*, 15 *Maine*, 122. The difference between the additions, labourer and yeoman is sufficient to abate the indictment. *Com. v. Sims*, 2 *Virg. C.* 374. As to degrees and mysteries generally, see 8 *Mod.* 51, *Str.* 556, *Ld. Raym.* 1541, *id.* 1179. In regard to the addition of place, the defendant must be described as of the town, or hamlet, or place, and county of which he was a resident. 2 *Ins.* 669; 2 *Hawk. c.* 23, s. 121; he must also be described of the county in which such town, &c. is. If his place of residence be known he should be described of it according to the truth; but when not known, it is usual to describe him of any parish in the county where the offence was committed. *Arch. C. P.* 26. If there be no addition, or a wrong one it can be taken advantage of by plea in abatement only. *R. v. Warren*, 1 *Sid.* 247; 2 *Hawk. c.* 23, s. 125; 2 *Ins.* 670; *Com. v. Cherry*, 2 *Virg. C.* 20; *Com. v. Lewis*, 1 *Mat.* 151; *Smith v. Bowker*, 1 *Mass.* 76; *State v. Bishop*, 15 *Maine*, 122. The stat. of additions, 1 *Hen.* 5, c. 5, extends only to defendants. *Bac. Abr. Indict. G.* 2; 2 *Leach*, 861; *Com. v. Hunt*, 4 *Pick.* 252; 4 *C. & P.* 579. See generally 2 *Ins.* 665; 2 *Hawk. c.* 23, s. 107, *id. c.* 25, s. 68; *Bac. Abr. Misnom. R. Indict. s.* 2; *Chit. C. L.* 167; *Arch. C. P.* 28-31; 3 *Burn's J.* 879.

præterito it relates to the day by the necessary grammatical construction, but if it be *ult' præterit'* with an abbreviation without the termination of the genitive or ablative case, it shall relate to the day, *viz.* the 10th day of the same *May*, as if it were in *English* the 10th day of *May* last past, it relates to the day and not to the month regularly, and so for the words next ensuing, *vide P. 23 Eliz. B. R. Rot. 39. b.* Sir *Richard Shuttleworth's* case, *M. 21 Jac. B. R. Croke, n. 14. Buckley's* case. (f)

If *A.* be indicted, that he *in festo Sancti Petri anno 20 Car. kild J. S.* this is not good, because there be two feasts of *St. Peter*, and neither without addition. *3. H. 7. 5. b. viz. St. Peter ad vincula, and St. Peter in cathedrâ.*

If *A.* be indicted, *quodd primo die Maii & secundo die Maii apud D.* he made an assault upon *B. and quandam togam ipsius B. adtunc & ibidem invent' felonice cepit, &c.* this indictment is not good, because there are several days mentioned before, and it is uncertain to which the felonious taking shall relate. *2 H. 7. 7. b. & 10 b.*

A. is indicted, *quodd primo die Maii anno 21 Eliz. in quendam B. insultum fecit & ipsum verberavit,* and says not *adtunc & ibidem verberavit,* yet ruled good, for the *vi & armis*, day and place named in the beginning refer to all the ensuing acts. *5 H. 7. 17. b.*

But in an indictment of felony there must be *adtunc & ibidem* to the stroke or to the robbery, and the day and place of the assault is not sufficient,* and this is *in favorum vitæ. P. 43 Eliz. B. R. Richardson's* case. And therefore it is usual to repeat the *adtunc & ibidem* to the several parts of the fact, as in larciny or robbery from the person, *quodd A. B. die, &c. anno, &c. apud, &c. in quendam C. D. insultum fecit, & bona & catalla ipsius C. D. scilicet unam togam ad valenc', &c. adtunc & ibidem inventam adtunc & ibidem felonice cepit & asportavit; A.* is indicted *quodd primo die Maii anno 2 Eliz. apud C. habens in manu sua dextrâ gladium, &c. percussit B.* and it is not said *adtunc & ibidem per-* [179] *cussit* quashed, because the day and year, and place relate only to the having of the sword, not to the stroke. *H. 42 Eliz. Croke, n. 11. Cotton's* case. (g)

If *A.* be indicted of murder or manslaughter, as well the day and place of the stroke or other act done inducing, death, as of the death, must be exprest, the former, because the escheat or forfeiture of lands relates thereto, the latter because it must

(f) *Cro. Jac. 677.*

* Because it is the stroke or robbery, which makes the felony.

(g) *Cro. Eliz. 739.*

appear, that. the death was within the year and day after the stroke.

But tho the day or year be mistaken in the indictment of felony or treason, yet if the offense were committed in the same county, tho at another time, the offender ought to be found guilty; but then it may be requisite, if any escheat or forfeiture of land be conceived in the case for the petit jury to find the true time of the offense committed, and therefore it is best in the indictments to set down the times as truly as can be, though it be not of absolute necessity to the defendant's conviction. 2 Co. Instit. 318. P. 32 Eliz. Syer's case adjudged. Co. P. C. p. 230.

And therefore, if for that variance he be acquitted, he is erroneously acquitted, and yet that erroneous acquittal shall be a good plea of *auterfoits acquit*, for if he be afterwards indicted for the same felony, and the day truly set forth, he may aver it to be the same felony notwithstanding the variance in the day. 2 Co. Instit. *ubi supra* in felony, and the same law is in treason. Co. P. C. p. 230.

Where the time of the day is material to ascertain the nature of the offense, it must be exprest in the indictment, as in an indictment for burglary it ought to say *tali die circa horam decimam in nocte ejusdem diei felonice & burglariter fregit*, yet by some opinion *burglariter* carries a sufficient expression, that it was done in the night.

So upon breaking a house in the day-time, to oust the offender of his clergy upon the statute of 39 Eliz. cap. 15. it is usual to add *tempore diurno*, for the statute expresseth it so, otherwise, tho the indictment be good, yet he shall not be ousted of his clergy.[2]

[2] Every material fact must be averred with time and place. *R. v. Holland*, 5 T. R. 607. *R. v. Aylett*, 1 id. 69. *R. v. Haynes*, 4 M. & S. 24. *State v. Beckwith*, 1 Stew. 318; but in alleging neglect or non performance generally, it is not necessary to specify time or place. 2 Hawk. c. 25. s. 79. Arch. C. P. 37. The words, "then and there" should precede every material allegation. 1 Leach, 529. Dougl. 212. 1 East. P. C. 346. *State v. Johnson*, 1 Walk. Miss. Rep. 392. See *R. v. Richmond*, 1 Car. & Ker. 240. *State v. Cherry*, 3 Murphy, 7. *Storrs v. State*, 3 Missouri, 45. That defendant "on divers days" committed an offence, is bad. 10 Mod. 249. Ld. Raym. 581. *State v. Brown*, 2 Murphy, 224. *State v. Walker*, id. 229; when these words may be rejected as surplusage. 10 Mod. 338. *State v. May*, 4 Den. 328. *People v. Adams*, 17 Wend. 475. *U. S. v. La Cote*, 2 Mason, 129. The omission of the words "year of our Lord" is fatal. *Whitesides v. People*, 1 Breeze, 41; but A. D. in initials will be sufficient. *State v. Hodgdon*, 3 Verm. 481. See 13 Verm. 647. Date in blank, bad. *State v. Roach*, 2 Hayw. 552. 3 Missouri, 45. See *Jacobs v. Com.* 5 S. & R. 315. *Simmons v. Com.* 1 Rawle, 142. The offence may be laid on any day before finding the bill, if it be within the time limited for prosecuting. *Shelton v. State*, 1 Stew. & Por. 208. *People v. Van Santvoord*, 9 Cowen, 660. See *R. v. Brown*, M. & M. 163. *Penna. v. McKee*,

III. Touching the place where the felony is committed; regularly the vill, or hamlet and county must be exprest in the indictment.

And herein much of what hath been said of the time will be applicable to the place, for where the time must be repeated again upon several acts done, yet regularly the place also must be repeated, *viz. adtunc & ibidem*.

In some crimes no vill need be named, as upon an indictment of barrettry, because he is a barretor every where; and it shall be tried *de corpore comitatûs*. *T. 43 Eliz. B. R. Tunstall's* case, but *P. 3 Car. B. R. Mann's* case the indictment was quashed for want of a vill alledged; the latter resolution is fittest to be pursued.

Suff. In the margin, the indictment supposing a fact done *apud S. in com' prædict'* is good, for it refers to the county in the margin.

But if there be two counties named, one in the margin, another in the addition of any party, or in the recital of an act of parliament recited in the premises of the indictment, the fact laid *apud S. in com' prædicto* vitiates the indictment, because two counties are named before, and it is uncertain to which it refers. *H. 43 Eliz. B. R. Croke, n. 12. Wingfield's* case. (h)

Indictment against *A. B.* that he *apud N. in com' prædict'* made an assault upon *C. D.* of *F. in com' prædict'*, & *ipsum adtunc & ibidem cum quodam gladio, &c. percussit, &c.* this indictment is not good, because two places named before, and if it refers to both, it is impossible, and if only to one, it must refer to the last, and then it is insensible. 2 *H. 7. 10. b. P. 44 Eliz. B. R. Ogle's* case.

A. is indicted, *quodd ipse tali die & anno apud C. in quendam B. insultum fecit, & ipsum cum quodam cultello, &c.*

(h) *Cro. Eliz. 739.*

Addis. 36. 5 S. & R. 315. It is not necessary to state the hour at which the act was done, unless rendered so by statute. 2 *Hawk. c. 25. s. 76.* See *Combe v. Pitt, Burr. 1434. State v. G. S. 1 Tyler, 295.* If the precise date of a fact be a necessary ingredient in the offence, it must be truly stated. *R. v. Trehearne, 1 Mood. C. C. 298.* In perjury the variance of a day is fatal. *U. S. v. McNeal, 1 Gallis. 387. U. S. v. Bowman, 2 W. C. C. R. 328.* If the time be repugnant or uncertain, it will be bad. *Jane (a slave) v. State, 3 Missouri, 45. State v. Hendricks, Confer. N. C. Rep. 369. See Serpentine v. State, 1 How. Miss. Rep. 260.* To lay the offence between two days, is bad. *Ld. Raym. 581. 10 Mod. 249. 2 Hawk. c. 25. s. 82. Chit. C. L. 216;* but see *U. S. v. Smith, 2 Mason's C. C. R. 143.* In an indictment for murder the death must be alleged within a year and a day from the time at which the stroke is stated to have been given. 1 *Hawk. c. 23. s. 90. State v. Onell, 1 Dev. 139.*

felonice percussit, occidit, & murderavit without saying *ad tunc & ibidem percussit, occidit, & murderavit*, the indictment is not good, for the assault may be at one day and place, and the killing at another. *P. 5 E. 6. Dy. 68, 69. 1 R. 3. 1. a.*

If a man be indicted for that *ratione tenuræ* of [181] certain lands he is bound to repair a bridge, and that it is in decay, it must be alleged where those lands lie. [3] *5 H. 7. 3. b.*

IV. Touching the name of the person upon whom the offense is committed.

An indictment of murder *cujusdam ignoti* is good, and so for stealing of the goods *cujusdam ignoti*, *Plo. Com. 85. b. Partridge's case, 1 Mar. Dy. 99. a.* so of an assault in *quendam ignotum*, and if he be acquitted or convicted, and be afterwards indicted for an assault or murder of such a man by name, he may plead the former conviction or acquittal, and aver it to be the same person. *11 Eliz. Dy. 285. a.*

But an indictment, *quod invenit quendam hominem mortuum, ac felonice furatus est duas tunicas*, without saying *de bonis & catallis cujusdam ignoti*, is not good. *11 R. 2. Enditement 27.*

If the goods of a chapel be stolen, the indictment shall say *bona & catalla capellæ in custodia prepositorum*, if it be done in time of vacation *bona & catalla capellæ tempore vacationis*; but if the goods of a parish church be stolen, as the bell, the books, &c. it shall run *bona parochianorum de S.*

[3] If the place be within the county, or other extent of the court's jurisdiction, a variance between the indictment and evidence, provided the place proved were within the jurisdiction of the court, will not be material. *2 Hawk. c. 25. s. 84; People v. Mather, 4 Wend. 229; see People v. Barrett, 1 Johns. 66; State v. Jones, 4 Halst. 357; State v. Adams, Murphy, 30.* But if the statute upon which the indictment is framed give the penalty to the poor of the parish in which the offence was committed, the parish must be truly stated. And where the place named is part of the description of a written instrument, or is to be proved by matter of record, it must be truly stated. So if the place where the fact occurred be a necessary ingredient in the offence, it must be truly set out. *Arch. C. P. 37.* Where the place is stated by way of local description and not as venue merely, a variance is fatal. *R. v. Redley, R. & R. 515; People v. Slater, 5 Hill N. Y. Rep. 401.* Where there is no such place within the county as that in which the offence is laid, the indictment is void. *3 Camp. 77; 1 Ph. Ex. 206; but contra, R. v. Dowling, R. & M. N. P. 433; R. v. Woodward, 1 Mood. C. C. 323; R. v. Bullock, id. 324.* An indictment for a capital offence ought to lay both the county and town. *Com. v. Springfield, 7 Mass. 9.* In an indictment for misdemeanor, a count with no venue, either by reference or otherwise, is bad at common law after verdict; though there is a venue in the margin. *R. v. O'Connor, 5 Ad. & El. N. S. 16.* Not necessary in an indictment for adultery to mention the township in which the defendant resided. *Duncan v. Com. 4 S. & R. 449; see U. S. v. Gibert, 2 Sumner's C. C. Rep. 19; R. v. Stowell, 12 Law Journ. N. S. 111; R. v. Gamperty, 9 Jurist, 401; 14 Law Journ. N. S. 118.*

in custodia gardianorem ecclesie, and shall not suppose them *bona ecclesie*. 7. E. 4. 14, 15. M. 31 & 32 Eliz. B. R. *Hudnam & Green versus Ringwood*. (i) T. 36 Eliz. B. R. *Methold & Barefoot*.

If the goods, which *A.* hath as executor of *B.* be stolen, the offender may be indicted, *quod bona B. testatoris in custodia A. executoris ejusdem B. &c. Lamb.* 496: or it may be general, *bona ipsius A.*

If *A.* dying, be buried, and *B.* opens the grave in the night time and steals the winding-sheet, the indictment cannot suppose them the goods of the dead man, but of the executors, administrators, or ordinary, as the case falls out. *Co. P. C.* 110. (k)

If *A.* delivers goods to *B.* a common carrier to carry for him, and *B.* is robbed, the indictment may suppose them the goods of *A.* or the goods of *B.* at election, for *B.* hath a kind of special property, because chargeable for them to *A.*

An indictment, *quod felonice, &c. cepit quandam peciam pannu cujusdam J. S. without saying de bonis* [182] *& catallis cujusdam J. S.* was therefore quashed. M. 38 & 39 Eliz. B. R. *Croke*, n. 6. *Long's case*. (l)

There is no need of an addition of the person robbed or murdered, &c. unless there be a plurality of persons of the same name, neither then is it essential to the indictment, the sometimes it may be convenient for distinction sake to add it, for it is sufficient, if the indictment be true, viz. that *J. S.* was killed or robbed, tho there are many of the same name. [4]

(i) *Cro. Eliz.* 145, 179.

(k) *Haine's case*, 12 *Co.* 112.

(l) *Cro. Eliz.* 490.

[4] Upon an indictment for the murder of a bastard child, it cannot be described by the name of its mother, unless that name has been gained by reputation. *R. v. Clark*, R. & R. 358; *R. v. Waters*, 1 *Mood. C. C.* 457; *R. v. Smith*, id. 402. Goods stolen from a bailee may be described as the goods either of the bailor or bailee. *R. v. Remnant*, R. & R. 136; 4 *C. & P.* 391; *R. v. Todd*, 2 *East*, P. C. 658; *R. v. Taylor*, 1 *Leach*, 356; *R. v. Statkam*, id.; *R. v. Deaken*, 2 *East*, P. C. 653; *R. v. Woodward*, id. 1 *Hawk. c.* 33. s. 47. But where the bailor steals his own goods from his bailee, they must be described as the goods of the bailee. *R. v. Wilkinson*, R. & R. 470; *R. v. Bramley*, id. 478. Possession of a servant, not sufficient to lay the property in him. 2 *East*, P. C. 652; *R. v. Hutchinson*, R. & R. 412; 2 *Russ.* 158. nor a married woman. *R. v. French*, R. & R. 491, id. 517. Goods let with a ready furnished lodging must, if stolen, be described as the goods of the lodger. *R. v. Belstead*, R. & R. 411; *R. v. Brunswick*, 1 *Mood. C. C.* 26. Goods seized under a *f. fa.* may be described as the goods of the party against whom the writ issued. *R. v. Easthall*, 2 *Russ.* 158; see *R. v. Healey*, 1 *Mood. C. C.* 1; 1 *Leach*, 464, 522; 2 *East*, P. C. 654. If the owner's name be unknown, he may be described as a "certain person to the jurors aforesaid unknown." 2 *Hawk. c.* 25. s. 71; 2 *East*, P. C. 651. 781; *Str.* 186. 497; *R. v. Smith*, 1 *Mood. C. C.* 402; 2 *Leach*, 578; *State v. France*,

V. Touching the thing wherein or of which the offense is committed, there is required a certainty in an indictment.

An indictment against *A.* that he is *communis latro*, 29 Ass. 45. *communis champartor, conspirator, confederator*, 29 Ass. 45. *defamator bonorum nominis & famæ*, M. 14 Jac. B. R. Jones's case, (m) *communis malefactor*, 22 Ass. 73. *common robber*, 3 E. 2. *action sur statute* 26 *communis malegestus & communis perturbator pacis domini regis*, M. 6 Car. 1 B. R. Periam's case, (n) are not good, because they are too general and contain not the particular matter, wherein the offense was committed.

But *communis barrectator & pacis domini regis perturbator & litium seminator* is good, because barrettry is an offense known in law, and consists of divers particulars, and the rest that is added thereunto are but the aggravations of the offense, for barrettry itself is the crime, M. 15 Jac. B. R. Bowser's case; (o) so an indictment, that he is *noctivagus* is good. H. 2 Car. 1 B. R. [5]

An indictment against *A.* *quodd felonice cepit & asportavit bona & catalla B.* without shewing what in certain, as *scilicet unum equum, unum bovem, &c.* is not good. Lamb. 496.

The number of things stolen must be exprest, therefore it is not sufficient to say *felonice furatus est aves* or *columbas* out of a dove-cote, or young hawks out of the nest without expressing their number.

If theft be alledged of any thing, the indictment must [183] set down the value, that it may appear, whether, it be grand or petit larceny. Lamb. 497.

(m) 2 R. A. 79. pl. 1.

(n) Ibid. 79. pl. 10.

(o) Ibid. 79. pl. 3.

1 Overton's Rep. 434. A mistake in the name of the party injured will be fatal. 2 East, P. C. 651. 784; 2 Leach, 774; 1 Chit. C. L. 217; Haworth v. State, Peck's Tenn. Rep. 89; but if the name proved be *idem sonans* with that stated in the indictment, and different in spelling only, the variance will be immaterial. Williams v. Ogle, Str. 889; 2 Tunt. 401; R. v. Foster, R. & R. 412; but see R. v. Tannet, R. & R. 351; R. v. Shakespear, 2 East, 83; Bingham v. Dickie, 5 Tunt. 814; Com. v. Gillespie, 7 S. & R. 469. See generally, R. v. Norton, R. & R. 519; R. v. Berrimen, 5 C. & P. 601; R. v. Williams, 7 id. 298; 4 id. 579; 2 id. 230; 2 Leach, 547; 1 Mood. C. C. 303; State v. Haddock, 2 Heywood, 162; Com. v. Hunt, 4 Pick. 252; Howard's case, 3 Sumner, 12; State v. Gardiner, Wright's Ohio Rep. 392.

[5] R. v. Roberts, 4 Mod. 103; R. v. Taylor, Str. 849, 1246; R. v. Witherington, id. 2; 2 Hawk. c. 25, ss. 57, 59; Com. Dig. Indict. G. 3; Bac. Abr. Indict. G. 1; R. v. Higgins, 2 East, 5; R. v. Rowed, 3 Q. B. 180; 2 Gale & Davison's Rep. 518; 1 Chipman, 129; Com. v. Davis, 11 Pick. 432, 6 Verm. 752; Com. v. Pray, 3 Pick. 362; James v. Com. 12 S. & R. 220; 9 Cowen. 587; State v. Ames, 1 Missouri, 372.

Where theft is charged in an indictment for a living thing, as a horse or sheep, the regular way is to say *pretii 5s. &c.* if it be of a dead thing, that is estimated in the indictment by weight or measure, there also it ought to be *pretii*, and so it may be, if it be of any single thing, tho dead, and not estimated by weight or measure.

But if it be dead things in the plural number, there it ought to be *ad valenciam*. *Lamb.* 497. but this I take to be but clerkship and not substantial, for if *pretii* be set instead of *ad valenciam*, or *e converso*, I think it doth not vitiate the indictment, and so it is, if one *pretii* or *ad valenciam* be added to several things, where in true clerkship it should be applied severally, it is good if the party be convict of all, but possibly, if the party be convict but of part, it is not good, because it will be uncertain whether grand or petit larceny. *Noy's Rep.* 115. *Wood and Smith*, yet *vide T. 23 Car. 1. & M. 23 Car. 1. B. R. Brook's case*, and *William Arundell's case* in [action of] trespass, where there is but one *ad valenciam*, where divers goods were taken, tho it be aided after a verdict, yet, if the judgment be by *nihil dicit*, it was ruled error, and indictments are not aided by verdict.

An indictment, *quodd felonice cepit 20 oves matrices & agnos* or *matrices & verveces*, is not good, because it doth not appear how many of one sort and how many of another, but 20 *oves* generally might have been good without distinguishing *matrices & verveces*, as in case of replevin or trespass.

But an indictment *de quatuor riscis & cistis*, *Anglicè* chests and coffers, is good, because *synonyma*, *P. 40 Eliz. Drecot & Henshaw*; regularly the same certainty is required in an indictment for goods, as in trespass for goods, and rather more certainty, for what will be a defect of certainty in a count will be much more defective in an indictment, therefore for this matter *vide title Count & Breve per totum*. [6]

VI. The fact itself must be certainly set down in an indictment.

(c) *Ibid.* 79. pl. 3.

[6] See 6 *T. R.* 267, *Ld. Raym.* 149; 1 *Car. & Kir.* 699, *id.* 190; *R. & R.* 492; 1 *C. & P.* 128; 1 *Mood. C. C.* 107, 242, 466; *R. & R.* 274; 2 *Rogers' Recorder*, 168; *Com. v. Wents*, 1 *Ashm.* 269; *Com. v. James*, 1 *Pick.* 376; *State v. Dowell*, 3 *Har. & John.* 310; *State v. Logan*, 1 *Missouri*, 377; *State v. Tootle*, 2 *Harring. Del. Rep.* 541; *State v. Brown*, 1 *Dev.* 137; *Turley v. State*, 3 *Hump. Rep.* 323; *State v. Sansom*, 3 *Brevard*, 5; *State v. Scribner*, 3 *Gill. & John.* 246; *People v. Payne*, 6 *Johns.* 103; *State v. Tilly*, 1 *N. & McCord*, 9; *State v. Thomas*, 2 *McCord*, 527; *State v. Wilson*, 1 *Port.* 110; *State v. Allen*, *Charlt.* 518; *State v. Bryant*, 2 *Car. Law Repos.* 617; *People v. Wiley*, 3 *Hill's N. Y.* 194.

An indictment against *A. quod felonice abduxit unum equum* without saying *cepit & abduxit* is not good, for he might have the horse by bailment, and then it is no felony. 13 *E.* 4. 10. *a.*

An indictment of poisoning, wherein it is alledged, that *J. S. fidem adhibens* to the prisoner, & *nesciens potum prædictum cum veneno fore intoxicatum accepit & bibit*, and says not *venenum prædictum*, is not good, and shall not be supplied by the implication of other parts of the indictment. 4 *Co. Rep.* 44. *b. Vaux's case.*

An indictment of rape, *quod felonice & carnaliter cognovit* without the word *rapuit* is not good, tho it concludes *contra formam statuti*, 9 *E.* 4. 26. *a.*

An indictment, that *A. exoneravit quoddam tormentum, &c. versus B. dans ei unam mortalem plagam* without saying *percussit*, is not good. 5 *Co. Rep.* Long's case, 122. *a.*

So if it be *dedit mortalem plagam* without *percussit*, it is not good. *P.* 9 *Jac. B. R. Bulstrode's Rep.* p. 124.

For burglary, the offense must be *fregit & intravit*.

VII. The offense itself must be alledged, and the manner of it. (*p*)

An indictment of felony must always allege the fact to be done *felonice*; an indictment of burglary must lay the offense to be *felonice & burglariter fregit & intravit*; an offense of high treason must be laid to be done *proditorie*; petit treason *felonice & proditorie*, for tho he be acquitted of the petit treason, he may be convict of the manslaughter or murder.

A. is indicted, that *furatus est unum equum*, it is but a trespass for want of the word *felonice*. *Stamf. P. C.* p. 98. *a.*

If *A.* be indicted, *quod 1 Decemb. anno, &c. apud, &c. felonice & ex malitiâ suâ præcogitatâ in & super B. insultum fecit, & cum quodam gladio, &c. adtunc & ibidem percussit, & dedit eidem B. mortalem plagam, &c.* whereof he died, the first *felonice & ex malitiâ suâ præcogitatâ* applied to [185] the assault runs also to the stroke; 1. because placed in the beginning of the sentence; 2. because done *adtunc & ibidem*.

An indictment of murder or manslaughter hath these certainties and requisites to be added to it more than other indictments, for it must not be only *felonice*, and ascertain the time of the act done, but must also,

1. Declare how, and with what it was done, namely *cum quodam gladio, &c.*

(*p*) This should have been the 5th head according to our author's division at the beginning of this chapter, but our author has here transposed it, and added a new fifth head touching the thing wherein the offense is committed, which makes the number of general heads in this chapter eight instead of seven.

Yet if the party were killed with another weapon, it maintains the indictment; but if it were with another kind of death, as *poisoning*, or *strangling*, it doth not maintain the indictment upon evidence. 2 Co. Inst. 310. Co. P. C. p. 48.

And if *A.* and *B.* are indicted for murder, and it is laid, that *A.* gave the stroke, and *B.* was present, aiding and abetting, yet if it falls out upon evidence, that *B.* gave the stroke, and *A.* was present, aiding and abetting, it maintains the indictment. 9 Co. Rep. *Sanchar's case*.(q)

So if *A.* be indicted for poisoning of *B.* it must allege the kind of poison, but if he poisoned *B.* with another kind of poisoning, yet it maintains the indictment, for the kind of death is the same.

2. He must shew in what hand he held his sword.

If an indictment runs thus, that *cum quodam gladio, quem in dextrâ suâ tenuit, percussit*, without saying *in dextrâ manu*, for this cause an indictment was quashed. P. 44 *Eliz. B. R. Cuppledick's case*.

3. Regularly it ought to set down the price of the sword or other weapon, or else say *nullius valoris*, for the weapon is a deodand forfeited to the king, and the township shall be charged for the value if delivered to them.

But this seems not to be essential to the indictment.

4. It ought to shew in what part of the body he was wounded, and therefore if it be *super brachium*, or *manam*, or *latus* without saying whether right or left, it is not good. 5 Co. Rep. 121. b. *Long's case*.

So if it be *in sinistro bracio*, where it should be *brachio*, it is not good, because insensible. T. 31 *Eliz.* [186] *B. R. Webster's case*.

So if the wound be laid *circiter pectus*, it is not good. T. 29 *Eliz. Clenche's Rep.* 10. *Super partes posteriores corporis* not good. H. 23 Car. 1. *B. R. Savage's case*.(r)

But *super faciem*, or *caput*, or *super dextram partem corporis*, or *in insimâ parte ventris* are certain enough. *Long's case*, 5 Co. Rep. 121. b.

5. Regularly the length and depth of the wound is to be shewed, but this is not necessary in all cases, as namely where a limb is cut off, 4 Co. Rep. 42. a. *Haydon's case*; so it may be also a dry blow, and *plaga* is applicable to a bruise or a wound.

But tho the manner and place of the hurt and its nature be requisite, as to the formality of the indictment, and it is fit to be

(q) 9 Co. 119. a. all that this case proves is only, that if a man be indicted as accessory to two, and he be found guilty as accessory to one, the verdict is good.

(r) *Syd.* 76.

done, as near the truth as may be, yet if upon evidence it appear to be another kind of wound in another place, if the party died of it is sufficient to maintain the indictment.

6. It is usual to alledge the party stricken to have been *in pace Dei & domini regis*, but not necessary to be inserted. 4 Co. Rep. 41. b. *Haydon's case*.

7. It is necessary to alledge in fact, that the party wounded died of that wound, and also the time and place, as well of the death as of the wound given, that it may appear, that he died within the year and day of that wound, as *de quâ quidem plagâ idem J. S. adtunc & ibidem instantèr obiit*, or *de quâ quidem plagâ mortali idem J. S. languebat, & languidus vixit usque talem diem anno supradicto, quo quidem die idem J. S. de plagâ mortali prædictâ obiit*.

Altho as well in the indictment of manslaughter as murder the stroke is to be alleged to be *mortalis plaga*, and given *felonice*, and in both cases *interfecit*, yet in case of murder there is somewhat more to be laid, or otherwise it will amount but to an indictment of manslaughter, and the offender shall have his clergy.

And the special words in an indictment of murder [187] are, 1. *Ex malitiâ præcogitatâ*, 2. *Murdravit*, this word *murdravit* is a word of art, and cannot be otherwise exprest, therefore *murderavit* instead of *murdravit* vitiates an indictment of murder. H. 45 Eliz. *Croke, n. 15. Ryle's case.*(s)

Tho *murdravit* be in the indictment, yet if it want the words *ex malitiâ suâ præcogitatâ*, the party shall have his clergy. Dy. 224. b. 11 Co. Rep. 37. a.

An indictment of treason for counterfeiting the king's coin ought to shew particularly what kind of coin, *viz. groats*, or *shillings*. 27 H. 6. *Enditement* 10. but altho it is usual to express the numbers of each kind, yet it is not of absolute necessity in the indictment. M. 38 & 39 Eliz. B. R. *Long's case*.

An indictment of high treason for conspiring the king's death ought not only to contain the compassing or conspiring to do the act, but must also set down an overt act in pursuance of it.

As in all indictments of felony there must be *felonice*, and of treason there must be *proditorie*, so it must be laid to be done *vi & armis* at common law. Stamf. P. C. 94. a.

But the statute of 37 H. 8: cap. 8. hath now made that not to be necessary.

And therefore P. 16 Jac. B. R. *Croke, n. 2. Hart's case.*(t) it was adjudged and affirmed in a writ of error, that an indict-

(s) Cro. Eliz. 990.

(t) Cro. Jac. 473. vide Cro. Jac. 345.

ment of rescue without the words *vi & armis* is good by reason of this statute, which extends to make good indictments of felony, treason, or other misdemeanors, notwithstanding the omission of *vi & armis*, as well as notwithstanding the omission of *gladiis, baculis & cultellis*, but this statute extends not to declarations in trespasses, suits between party and party, or informations for the king, but only to indictments.[7]

[7] If any fact or circumstance which is a necessary ingredient in the offence be omitted in the indictment, such omission vitiates the indictment, and the defendant may avail himself of it by demurrer, motion in arrest of judgment, or writ of error. *R. v. Osmer*, 5 East, 304; *R. v. Everett*, 8 B. & C. 114, 5 C. 2 M. & R. 35; *R. v. Leese*, Andr. 226; *R. v. Norton*, 8 C. & P. 196; *R. v. Martin*, 8 Ad. & Ell. 481; *R. v. Cheere*, 7 D. & R. 461, 5 T. R. 623, 4 B. & C. 902, 1 B. & Ad. 861; *People v. Rust*, 1 Caine, 133. Any fact or circumstance laid in the indictment, which is not a necessary ingredient in the offence, may be rejected as surplusage. *R. v. Jones*, 2 B. & Ad. 611; and if there be any defect in the manner of stating such matter, the defect will not vitiate the indictment. *R. v. Walker*, 4 Rep. 41 a.; *R. v. Holt*, 2 Leach, 595; *R. v. Howarth*, 3 Stark. 26, Arch. C. P. 130. All the facts and circumstances which constitute the offence must be stated with such certainty and precision that the defendant may be enabled to judge whether they constitute an indictable offence or not, in order that he may plead or demur—or what species of offence they constitute, to enable him to prepare his defence, to plead a conviction or acquittal in bar of another prosecution for the same offence, &c., and that there may be no doubt as to the judgment which should be given, in case of conviction; see *R. v. Rowed*, 3 Q. B. 180, 2 Ga. & Dav. 518; *R. v. Mason*, 2 T. R. 581; *R. v. Manox*, Str. 1127; *R. v. Harper*, 5 Mod. 96; *R. v. Lake*, 3 Leon. 268; *R. v. Roberts*, Show. 289, 2 Hawk. c. 25, s. 58; *R. v. Stocker*, 1 Salk. 342, 371; *R. v. Stoughton*, Str. 909; *R. v. Flint*, Hardw. 370; *R. v. Horne*, Cowp. 682; *R. v. Holland*, 5 T. R. 611, 623, 1 Leach, 249; *R. v. Perrott*, 2 M. & S. 386; *R. v. Morley*, Younge & Jarvis, 221; *R. v. Jones*, 1 Car. & Kir. 243; *R. v. Marshall*, 1 Mood. C. C. 158; *State v. Dalton*, 2 Murph. 379; *Com. v. Pintard*, 1 Browne, 59; *Simmons v. Com.* 1 Rawle, 142; *Com. v. Gillespie*, 7 S. & R. 469. Certainty to a certain intent in general is all that is required in indictments. See, for the different kinds of certainty, *Co. Litt.* 303 a.; *R. v. Long*, 5 Rep. 121 a.; Arch. C. P. 43. Mere matter of inducement does not require so much certainty as the statement of the offence. *R. v. Wright*, 1 Vent. 170; *Com. Dig. Indict. G. 5*. In an indictment for soliciting or inciting to the commission of a crime, or for aiding and assisting in the commission of it, it is not necessary to state the particulars of the incitement, &c. or of the aid, &c. *R. v. Higgins*, 2 East, 5; see *Com. v. Rogers*, 5 S. & R. 463; *State v. John*, alias *Jack Dent*, 3 Gill. & John. 8; *People v. Bush*, 4 Hill's Rep. 133. When a statute enumerates offences disjunctively, the indictment must charge them conjunctively. *Salk.* 342, 371; 5 Mod. 137; 8 Id. 32; *Burr.* 399; *Angel v. Com.* 2 Virg. Cas. 231; *Jones v. State*, 1 McMullen, 236; *State v. Price*, 6 Halst. 203. An indictment which may apply to two offences and does not specify which, is bad. *R. v. Graham*, 1 Leach, 87; *R. v. Marshall*, 1 R. & Mood. C. C. 158; but see *Resp. v. Caldwell*, 1 Dall. 150; *State v. Gilbert*, 13 Verm. 647. If the indictment charge that he murdered or caused to be murdered, forged or caused to be forged, &c. it is bad. 2 Hawk. c. 25, s. 58; *Salk.* 342, 371; 1 Chitt. C. L. 231. The offence must be positively charged, and not stated by way of recital; *R. v. Inhab. of Hamworth*, Str. 900, n. 1; *R. v. Crenkurst*, *Ld. Raym.* 1363; nor argumentatively; *Salk.* 373. Conclusions of law resulting from the facts of the case need not be stated; it is enough to state the facts and leave the court to draw the inference. 2 Leach, 941; *R. v. Smith*, 2 B. & P. 127, R. & R. 5, 1 East, P. C. 163; *R. v. Booth*, R. & R. 7, id.,

VIII. Touching the conclusion of the indictment.

Upon an indictment of murder, where the stroke is supposed to be done at one day or place, and the death at another day or place, the conclusion ought not to be & *sic felonice, volun-*

29. Where the offence cannot be stated with complete certainty, it is sufficient to state it with as much certainty as it is capable of. See 1 *Chit. C. L.* 171, 229; *R. v. Gill*, 2 B. & Ald. 209, 5 C. 1 *Chit. Rep.* 698; *R. v. Kenrick*, 5 Q. B. 49, 1 *Dav. & Mer.* 208; *Com. v. Judd*, 2 *Mass.* 329; *Com. v. Collins*, 3 S. & R. 220; *Com. v. Myffin*, 5 W. & S. 461. Where an offence is stated with greater particularity than is necessary, the unnecessary allegations, if descriptive of some ingredient in the offence, and not merely of matters of aggravation, are material and relevant, and cannot be rejected. *Arch. C. P.* 56. Objections to the form and sufficiency of an indictment may be discussed and decided during the trial, before the jury; but generally this should be only on motion to quash, in arrest of judgment, or on demurrer. *U. S. v. Gooding*, 12 *Wheat.* 460, 6 *Cond. Rep.* 572.

It is essentially necessary in an indictment for murder to set forth particularly the manner of the death and the means by which it was effected. 1 *East, P. C.* 341. If it appear that the party were killed with a different weapon from that described, or if it be laid by one sort of poison and it turn out to have been by another, it will maintain the indictment. *R. v. Culkitt*, 5 C. & P. 121; *R. v. Waters*, 7 *id.* 250; *R. v. Grounsel*, *id.* 788; *R. v. Clark*, 1 B. & B. 473, 3 *Camp.* 75; *People v. Townsend*, *et al.* 3 *Hill*, 479; *People v. Colt*, *id.* 432. But if a person be indicted for one species of killing, as by poisoning, he cannot be convicted by evidence of a species of death entirely different, as by shooting, strangling, &c. *Macally's case*, 9 *Rep.* 67, 2 *Hawk.* c. 23, s. 84; 1 *East, P. C.* 341; *R. v. Kelly*, R. & M. C. C. R. 113; *R. v. Thompson*, *id.* 139; *R. v. Martin*, 5 C. & P. 128; *Brown's case*, 1 *Lew.* 165. It seems to be necessary to aver a striking where the death has been occasioned by a wound, bruise, or other assault. *R. v. Long*, 5 *Rep.* 122, s.; *R. v. Lorkin*, 1 *Bulet.* 124; but see 2 *Hawk.* c. 23, s. 82; *R. v. Dale*, 1 R. & M. C. C. O. 5; *White v. Com.* 6 *Binn.* 179; *State v. Owen*, 1 *Murph.* 452; *Gibson v. Com.* 2 *Virg. Ca.* 111. It seems that if the death be occasioned by any instrument holden in the hand of the party killing at the time, it should be so alleged, and that regularly the instrument should be stated to be of a certain value or of no value; but see the observations of Mr. *East*, P. C. 341. An indictment for murder may be good without stating the accused to be a person of sound memory and discretion, and though the killing must be set out in such terms as to show clearly that it was unlawful, yet the word "unlawful" need not be necessarily used. *Jerry v. The State*, 1 *Blackf.* 396. The indictment must state that the act by which the death was occasioned was done feloniously, and that it was done of malice aforethought, and it must also state that the prisoner murdered the deceased. *Hawk.* c. 23, s. 77; *Com. v. Gibson*, 2 *Virg. Cas.* 70; but see *Anderson v. State*, 5 *Pike*, 445; *Resp. v. Honeyman*, 2 *Dall.* 293. If the averment of malice aforethought be omitted, and the indictment only allege that the stroke was given feloniously, or that the prisoner murdered, &c. or killed, or slew the deceased, the conviction can only be for manslaughter. 1 *East, P. C.* 345. It was formerly considered necessary to state in what part of the body the wound was given, and also to state the length and breadth of it. 5 *Rep.* 120, *Cra. Jac.* 95, 2 *Hawk.* c. 23, s. 80; but this seems to be no longer essential. See *R. v. Mosely*, R. & M. C. C. 97; *R. v. Tomlinson*, 6 C. & P. 370; *Turner's case*, 1 *Lew.* 177; *U. S. v. Maunier*, *Nor. Car. Cas.* 79; *State v. Owen*, 1 *Murph.* 452; see *State v. Moses*, 2 *Dev.* 452. Where the manner of the death is doubtful it will be proper to lay it differently in different counts so as to meet the evidence. See *R. v. Hindmarsh*, 2 *Leach*, 569. The death by the means stated must be positively alleged. 1 *East, P. C.* 343; *R. v. Tye*, R. & R. 345; *State v. Wimberly*, 3 *McCord*, 190. The words "languishing did live," &c. are not a material part of the indictment and may be struck out. *Penn. v. Bell*, *Addis.* 173. The respective times of the

tarie, & ex malitia sua præcogitata prædictus J. S. præfatum A. B. at the day and place, where the stroke was given, interfecit & murdravit, this is not good, because tho the stroke is the offense and cause of the death, yet it is neither murder nor manslaughter till the party die. *M. 32 & 33 Eliz. B. R. Croke, n. 13, Foster's case.*(u)

But if it supposes the murder or manslaughter to be where the party died, this is good, for then and not before it is murder. *4 Co. Rep. 41. b. Haydon's case.*

But the best way is *& sic præfatus A. ipsum B. &c. modo & formâ prædictis interfecit & murdravit.* *4 Co. Rep. 42. b. Haydon's case.*

But if the conclusion be *& sic præfatum B. apud C.* (where the stroke only was given) *modo & formâ prædict' interfecit & murdravit*, it is not good, for it is repugnant. *M. 32 & 33 Eliz. B. R. Croke, n. 13. Foster and Hume.*

And if in the same case the conclusion be only *& sic die & loco prædictis interfecit & murdravit*, it is doubtful whether it be good, because one time and place is alleged for the stroke, another for the death, and (*predictis*) may refer to either, *H. 42 Eliz. B. R. Croke, n. 12. Wingfield's case.*(x)

Regularly every indictment ought to conclude *contra pacem domini regis*; for that is not taken away by the statute of 37 *H. 8. cap. 8.*

And therefore an indictment without concluding *contra pacem, &c.* is insufficient, tho it be but for using a trade not being an apprentice. *H. 23 Car. 1. B. R.* for every offense against a statute is *contra pacem*, and ought so to be laid.

But an indictment need not conclude, *& contra coronam & dignitatem ejus*, tho it be usual in many indictments. *M. 23 Car. B. R.*

An indictment that concludes *contra pacem*, and saith not *domini regis*, is insufficient. *M. 23 Car. 1. adjudged.*

If *A.* be indicted for an offense supposed to be committed in

(u) *Cro. El. 156. 4 Co. 42. b.* by the name of *Hume* and *Ogle*.

(x) *Cro. Eliz. 739.*

wound and death must be shown, that it may appear that the deceased died within a year and a day from the stroke or other cause of death; but though the day or year be mistaken it is not material, if it appear by the evidence that the death happened within the time limited without which the law does not attribute the death to the stroke or poison. *1 Russ. on Cr. 563; State v. Orrell, 1 Dev. 139.* An indictment against two, which states the death to be the result of two different injuries inflicted by each of the defendants separately, on different days, is bad. *R. v. Devett, 8 C. & P. 639.* See generally *4 Bl. Com. 306; Arch. C. P. 1, 482; by Welsby, 1846; Roec. Cr. Ev. 74-405; 1 Russ. on Cr. 548, by Sharewood, 1845; 3 Burn's J. edit. 1845, p. 856; Davis' Virg. C. L. 428; Whart. C. L. 60, 268.*

the time of a former king, and concludes *contra pacem domini regis nunc*, it is insufficient, for it must be supposed to
 [189] be done *contra pacem* of that king in whose time it was committed.

But if a man be indicted in the time of one king *contra pacem domini regis nunc*, he may be arraigned for that offense in the time of his successor. 1 E. 6. B. Corone 178. *Enditement* 44. neither is the indictment itself discontinued by the demise of the king, tho in some cases the process be. 7 Co. Rep. 30, 31.

If an offense be supposed to be begun in the time of one king, and continued in the time of his successor, (as a nuisance,) it must conclude *contra pacem* of both kings, or else it is insufficient. T. 3 Jac. B. R. *Yelverton's Rep.* 66. Sir John *Winter's* case.

If an offense be alledged in the time of Q. *Eliz.* and the indictment taken in the time of K. *James*, and concludes *contra pacem nuper reginæ & domini regis nunc*, it seems good, and *domini regis nunc* but surplusage, as well as in a count in trespass. M. 13 Jac. Croke, n. 3. *Cottington and Wilkins*, (2) *quære*.

Touching the conclusion *contra formam statuti*, somewhat hath been said in the last chapter; I shall add some things more.

If an offense be newly enacted, or made an offense of a higher nature by act of parliament, the indictment must conclude *contra formam statuti*, as an indictment for buggery, transporting of wool, &c.

Rape, tho before the statute of *Westminster* 2. it was a trespass, yet being made felony by that statute, the indictment ought to conclude *contra formam statuti*, 6 H. 7. 5. a.

If an offense were high treason, &c. at the common law, and a declarative act of parliament declares it so, as the statute of 25 E. 3. *de Proditionibus*, the statute of 3 H. 5. of clipping the coin, &c. till repealed by 1 Mar. the indictment is good with a conclusion *contra formam statuti*, or without such a conclusion.

But at this day the indictment for clipping, washing, &c. of coin enacted to be treason by the statutes of 5 & 13
 [190] *Eliz.* must not only express, as the statute requires, that it was (*causa lucri*,) but must conclude *contra formam statuti*.

If an offense were felony at common law, but a special act of parliament oust the offender of some benefit, (that the common law allowed him,) when certain circumstances are in the

fact, tho the body of such indictment must express those circumstances according as they are prescribed in the statute, yet the indictment must not conclude, *contra formam statuti*.

Thus the statute of 21 *Jac. cap. 27* concerning murdering of bastard children requires proof by one witness, that the child was dead born, the indictment must shew, that it was a bastard child, to bring the offender within that statute, but concludes not *contra formam statuti*.

So by the statute of 8 *Eliz. cap. 4.* in cases of pick-pockets, 39 *Eliz. cap. 15.* breaking houses in the day-time, and stealing to the value of 5s. the statute of 23 *H. 8. cap. 1.* in cases of petit treason, wilful murder of malice prepense, robbing in or near the highway, 18 *Eliz. cap. 7.* in case of burglary, the statute of 4 & 5 *P. & M. cap. 4.* in case of malicious commanding, &c. any person to commit murder, robbery, wilful burning, the offenders are ousted of their clergy; the body of the indictment must bring them within the express purview of the statutes or otherwise they shall have the benefit of clergy, but it need not conclude *contra formam statuti*, neither is it usual in such cases, for they were felonies before, and the statutes do not give them a new punishment, nor make them to be crimes of another nature, but only in certain cases take away clergy.

But yet, if they should conclude in these cases *contra formam statuti*, it would not vitiate the indictment, but would be only surplusage; for tho the statutes do not give a new penalty, yet they take away an old privilege, when the case falls within the circumstances mentiond by the act.

Upon the statute of 1 *Jac. cap. 8.* ousting persons of clergy in case of stabbing, the other party not having a weapon drawn, nor stricken first, I have known it held it is sufficient, that the indictment bring the fact within the purview [191] of the statute, tho it concludes not *contra formam statuti*, because it was a felony before, and the statute only takes away clergy. *H. 23 Car. 1. Page and Harwood.(a)*

Yet the usual course at this day is to conclude such an indictment *contra formam statuti*, and accordingly it hath been ruled good. *T. 9 Jac. B. R. Croke, n. 4. Bradley and Banks*, but it is not there questioned but that it may be good without it; so that in these cases, where clergy is specially ousted by an act of parliament, the indictment is good with this conclusion or without it, but the best way in these cases is to follow what is most usual.

If an offense be at common law, and also prohibited by statutes, the indictment may conclude *contra formam statuti*

or *statutorum*; thus in barretry, tho there be no direct statute against it by that name, yet the general tenor of the several acts running against it by circumlocutions, the indictment concluding *contra formam statuti*, or *diversorum statutorum* is good, and it is the usual form. *M. 31 & 32 Eliz. B. R. Croke, n. 14. Burton's case, (b) H. 9 Car. 1. B. R. Chapman's case, (c)* but it must conclude also *contra pacem, M. 6 Car. B. R. Periam's case. (d)*

If an offense be at common law, and also prohibited by statute, with a corporal or other penalty, yet it seems the party may be indicted at common law, and then, tho it conclude not *contra statuti*, it stands as an indictment at common law, and can receive only the penalty, that the common law inflicts in that case.

Thus an indictment for a riot is good, tho it concludes not *contra formam statuti*, because an offense at common law, tho prohibited also by acts of parliament under severer penalties. *P. 5 Jac. B. R. Wormall's case. (e)*

So it seems, if perjury be committed, that is within the statute of 5 *Eliz. cap. 9.* but concludes not *contra* [192] *formam statuti*, yet it is a good indictment at common law, but not to bring him within the corporal punishment of the statute.

And yet *Mich. 10 Jac. B. R.* an indictment of forceable entry upon the statute of 8 *H. 6. cap. 9.* and *Mich. 9 Car. 1. B. R.* an indictment for forgery quashed for not concluding *contra formam statuti*, *Smith's case; (f)* yet both these were offenses at common law tho restitution were not at common law in the first case nor pillory and loss of ears in the second, but only fine and imprisonment, or at most standing in the pillory, but without mutilation.

Regularly, if a statute only make an offense, or alter an offense from one crime to another, as making a bare misdemeanor to become a felony, the indictment for such new made offense, or new made felony must conclude *contra formam statuti*, or otherwise it is insufficient.

And on the other side, if an offense be purely at common law, if it conclude *contra formam statuti*, it is insufficient, and shall be quashed, except in the instance above given touching clergy, *de quo supra.*

And therefore an indictment of battery concluding *contra formam statuti* is insufficient, and shall be quashed. *T. 12 Car. B. R. Croke, n. 2. Cholmley's case. (g)*

(b) *Cro. Eliz.* 148.

(c) *Cro. Car.* 340.

(d) 2 *R. A. 82. pl. 5.*

(e) 2 *R. A. p. 82. pl. 4.*

(f) 2 *R. A. 82. pl. 3.*

(g) *Cro. Car.* 465.

These general observations I shall add touching indictments upon statutes, and concluding *contra formam statuti*.

Altho an indictment grounded upon a statute must conclude *contra formam statuti*, yet it is not necessary to recite the statute in the indictment, unless it be a private statute, whereof the court cannot take notice. *Plo. Com.* 79. *b.* *Patridge's case.* *Dy.* 347. *a.* 363. *a.*

Altho it need not recite a general penal statute, yet it must bring the fact within the express prohibition of the statute, otherwise the conclusion *contra formam statuti*, and the implication thereof will not aid the indictment, but it will be insufficient, 9 *E.* 4. 26. *b.* As in an indictment in a *premunire* for aiding one being a principal maintainer of the jurisdiction of the see of Rome *contra formam statuti*, yet these words being omitted *to the intent to set forth the authority, &c.* which are part of the qualification of the offense containd in the statute, the indictment is insufficient, and not aided by [193] the conclusion *contra formam statuti*. *T.* 20 *Eliz.*

Dy. 363. *a.* *ibid.* 347. *a.* so an indictment upon the statute of 1 *Jac. cup.* 12. of witchcraft, if *A.* be indicted, that *exercuit incantationem, Anglicè* witchcraft, *contra formam statuti*, without saying, that thereby any person was pined, lamed, &c. in his body, it is insufficient, because that is a circumstance required to make it felony; but if the indictment be, that *exercuit, anglicè* did employ *malos & nefarios spiritus ad intentione* to destroy *J. S.* this is good, tho no other event ensues, for the bare employment of evil spirits to or for any intent in felony. *T.* 24 *Car.* 1. *B. R.* upon an indictment removed from *St. Edmunds-Bury*. [8]

[8] For conclusions of indictments for offences at common law, see *R. v. Lane*, 6 *Mod.* 128; *R. v. Cook*, *R. & R.* 176; *R. v. Wyatt*, *Salk.* 381; 1 *Ventr.* 108; *R. v. Lookup*, *Burr.* 1901; *R. v. Taylor*, 5 *D. & R.* 422; *R. v. Scott*, *R. & R.* 415; *R. v. Chalmers*, 1 *Mood. C. C.* 352, 5 *C. & P.* 331; *R. v. Pringle*, 2 *M. & Rob.* 109.

The constitutions of most of the States require all indictments to conclude "against the peace and dignity of the State." *Com. v. Rogers*, 5 *S. & R.* 463; *State v. Kean*, 10 *N. H. R.* 347; *State v. Washington*, 1 *Bay*, 120; *State v. Anthony*, 1 *McCord*, 285; *Anderson v. State*, 5 *Pike*, 445; *State v. Yancey*, 1 *Tr. Com. Rep.* 237; *State v. Johnson*, 1 *Walker*, 392.

Where a statute either creates the offence altogether, or makes an offence at common law an offence of a higher nature, the indictment must conclude *contra formam statuti*. 2 *Hawk. c.* 35, *s.* 116; *R. v. Clark*, *Salk.* 370; *State v. Jim*, 3 *Murph.* 3; *Brown's case*, 3 *Greenl.* 177; *Com. v. Springfield*, 7 *Mass.* 9; *State v. Soule*, 20 *Maine*, 19; *Chapman v. Com.* 5 *Whart.* 427; *Com. v. Stockbridge*, 11 *Mass.* 279; *Com. v. Northampton*, 2 *Mass.* 116; *Com. v. Cooley*, 10 *Pick.* 37; *Com. v. Searle*, 3 *Binn.* 332; *Craun v. State*, 2 *Yerger*, 390. If the indictment do not make it an offence of a higher nature, but merely increase or otherwise alter the punishment, the indictment, in order to bring the offence within the statute, must conclude *contra formam statuti*, but if it do not so conclude, it may still be a good indictment for the offence at common law. *Com. v. Lunigam*, 2 *Bos. Law Reporter*, 49;

And thus far touching the forms of indictments, wherein generally we are to take notice, 1. That none of the statutes of jeofails extend to indictments, and therefore a defective indictment is not aided by verdict.

2. That in favour of life great strictnesses have been in all times required in points of indictments, and the truth is, that it is grown to be a blemish and inconvenience in the law, and the administration thereof; more offenders escape by the over easy ear given to exceptions in indictments, than by their own innocence, and many times gross murders, burglaries, robberies, and other heinous and crying offenses, escape by these unseemly niceties to the reproach of the law, to the shame of the government, and to the encouragement of villany, and to the dishonour of God. And it were very fit, that by some law this over-grown curiosity and nicety were reformed, which is now become the disease of the law, and will I fear in time grow mortal without some timely remedy.

State v. Phelps, 11 Vir. Rep. 117. Or if the statute be merely declaratory of an offence at common law without adding to or altering the punishment, an indictment for the offence may conclude *contra formam statuti*, or as at common law. *People v. Enoch*, 13 Wend. 175; *State v. Ripley*, 2 Brevard, 382; *Warner v. Com.* 1 Penn. Rep. 154; *State v. Evans*, 7 Gill. & Johns. 390. But where a statute merely takes away a certain privilege or benefit from a person committing a common law offence under particular circumstances, to which benefit or privilege the defendant would have been entitled at common law, an indictment for the offence, although it must charge it to have been committed under the circumstances mentioned in the statute should not conclude *contra formam statuti*. *R. v. Polly*, 1 C. & Kir. 77; *R. v. Pearson*, 1 Mood. C. C. 13, 5 C. & P. 121; *R. v. Chatburn*, 1 Mood. C. C. 403; *R. v. Lucy Berry*, 1 M. & Rob. 463; *Com. v. Searle*, 3 Binn. 332; *Russell v. Com.* 7 S. & R. 177; *White v. Com.* 6 Binn. 179. Where one statute is relative to another, as where one creates the offence and the other the penalty, an indictment for the offence must conclude *contra formam statutorum*. *R. v. Adams*, 1 C. & Mar. 299; *State v. Calias*, 2 Harr. & Gill. 480; *State v. Pool*, 2 Dev. 202. But if one statute subject an offence to a pecuniary penalty, and a subsequent statute make it a felony, an indictment for the felony should conclude *contra formam statuti*. *R. v. Pim*, R. & R. 425. When the offence is prohibited by several independent statutes, the indictment may conclude *contra formam statuti* or *statutorum*. 2 Hawk. c. 25, s. 117. *Kerne v. People*, 9 Wend. 203; *Bufman's case*, 8 Greenl. 113; *State v. Jones*, 4 Halst. 357. An indictment for a common law felony committed abroad, but made triable in England by statute, need not conclude *contra formam statuti*. *R. v. Sawyer*, R. & R. 294. Though there be but one statute prohibiting the offence, it is not error to conclude contrary to the "statutes." *Teronley v. State*, 3 Harris, 311; *U. S. v. Gibert*, 2 Sumner's C. C. R. 19. Omitting to conclude *contra formam statuti* when it is essential is error, and may be made the subject of demurrer, motion in arrest of judgment, or writ of error. *R. v. Pearson*, 1 Mood. C. C. 313; *R. v. Radcliffe*, 2 id. 68. One count concluding *contra formam statuti* does not cure another without the proper conclusion. *State v. Soule*, 20 Maine, 19. If an indictment conclude *contra formam statuti*, when it should conclude as at common law, the mistake is not material and the words *contra formam statuti* may be rejected as surplusage. *R. v. Matthews*, 5 T. R. 162, *R. v. Bathurst*, Say. 225; *Ward v. Rich*, 1 Ventr. 103; *State v. Buckman*, 8 N. H. R. 203; *Knowles v. State*, 3 Day, 103; *State v. Cruiser*, 3 Harris, 108; *Southworth v. State*, 9 Conn. 560; *Com. v. Gregory*, 2 Dana, 417; *Com. v. Hoxey*, 16 Mass. 385; *Resp. v. Newell*, 3 Yeates, 407; *Penn. v. Bell*, Addis. 171; *Haslip v. State*, 4 Hayne. 273.

CHAPTER XXVI.

• CONCERNING PROCESS UPON INDICTMENTS.

IN many cases upon an indictment process of outlawry lies not at common law, nor at this day, as in an indictment of forestalling, 22 E. 4. 11. *b.* but in an indictment of trespass the process is *venire facias*, and when *non inventus*, is returned *capias* and *exigent*.

But in all indictments of felony or treason process by *capias* and *exigent* lies, and at the common law in case of felony or treason there was but one *capias*, and upon *non inventus* returned an *exigent* awarded, and so to the outlawry. 22 Ass. 81. 1 H. 5. 6. *a.*

But by the statute of 25 E. 3. cap. 14. If a man be indicted before justices in their sessions to hear and determine, and be returned *non est inventus* upon the *capias* issued, another writ of *capias* shall issue returnable three weeks after with a precept to seize his goods, and detain them till the precept returned, and if again *non inventus* be returned, then an *exigent* shall issue, and the goods forfeit, and if he yield himself upon the *capias*, then the goods saved.

This statute extends not to treason, and therefore certainly in treason the *exigent* must issue upon *non inventus* returned upon the first *capias*.

And altho the statute speaks generally of felony, it seems that upon an indictment of murder the *exigent* shall issue after the first *capias*, as at common law, and accordingly in an appeal of robbery. 8 H. 5. 6. *b.* Process 226. Coron. 184.

But it is said, that in an indictment (or appeal) of robbery there shall be two *capias* in the king's bench before the *exigent* shall issue. 8 H. 5. *ubi supra*. Stamf. P. C. Lib. II. cap. 17. fol. 67. *a.*

But at this day the process in case of an indictment [195] of any felony is only one *capias*, and then an *exigent*.

For this statute of 25 E. 3. cap. 14. as to the second case is hardly applicable to the king's bench, nor indeed well to other justices, that sit by commission, for the second *capias* is to be returned at three weeks after, which may be out of term, or after the session of the justices ended; therefore *quære* the usage.

By the statute of 8 H. 6. cap. 10. upon appeals or indictments of treason, felony, or trespass before justices of peace or any other having power to take such indictments or appeals, or

other justices or commissioners in any county or franchise against any person dwelling in any other county than where the indictment of appeal is taken, after the first *capias*, another *capias* shall issue to the sheriff of that county, wherein the party indicted is supposed to be conversant, returnable before the said justices or commissioners three months after, &c. with a precept to the sheriff to make proclamation at two county courts for his appearance at the day of the return, and then the *exigent* to issue upon his default, and in case any *exigent* be awarded, or outlawry pronounced, otherwise to be holden for none.

But if the party were conversant in the county where he is indicted at the time of the felony or treason committed, the process to be, as was at common law.

A proviso not to extend to the king's bench nor *Chester*.

By the statute of 10 H. 6. cap. 6. the same process is directed upon indictments of felony or treason removed into the king's bench by *certiorari*, or into any other courts.

But as to indictments of felony or treason originally taken in the king's bench, they are not within these statutes, but by the statute of 6 H. 6. cap. 1. there is special provision made, that before any *exigent* awarded the court shall issue a *capias* to the sheriff of the county, where the indictment is taken, and another to the sheriff of that county whereof he is named in the indictment, having six weeks time or more before the return, and after these writs returned the *exigent* to issue as before.

Upon these statutes, little effect hath been obtained, [196] for if the party were conversant in the county where the felony or treason was committed, (as indeed he cannot be otherwise,) then he may be named of that place where the fact was committed in the indictment, and then the process is to go, as at common law before the statutes, and this is the usual course at this day, that if the felony be committed in *A.* in the county of *B.* the indictment runs only, *quodd J. S. nuper de A. in com' B. prædict'* (where the indictment is taken.)

And upon the same reason it is, if *J. S.* be indicted in the county of *B.* for a felony there committed, and the indictment runs thus: *J. S. nuper de A. in com' B. aliàs J. S. nuper de D. in com' S.* there shall no process go to the sheriff of *S.* because that addition is only in the *aliàs dictus*, which is neither material nor traversable, and therefore process shall issue only in the county of *B.* where he is indicted, and no *capias* with proclamation in the county of *S.* and the same law in an appeal. 1 E. 4. 1. a.

If *J. S.* be indicted in the county of *B.* in this manner; *J. S. de A. in com' B. nuper de C. in com' D.* the *capias* shall issue

only in the county of *B.* for *there* the indictment supposeth him actually conversant at the taking of the indictment; but if the indictment runs thus: *J. S. nuper de A. in com' B. nuper de C. in com' D.* in this case there shall go a *capias* not only into the county of *B.* where he is indicted, but upon the return thereof, (if it be before commissioners,) a *capias* with proclamations to the sheriff of *D.* and (if in the king's bench upon an indictment originally found there,) one *capias* to one sheriff, and another to the other sheriff according to the statutes of 8, 10 and 6 *Hen. 6.* above-named, because he is not named *de A. in com' B.* but *nuper de A. in com' B.* and *nuper de C. in com' D.* and not with an *aliàs dictus*, as in the former case. 30 *H. 6. Process* 192.(h)

If a man be indicted by the name of *J. S. nuper de A. in com' Cestrie*, the second *capias* with proclamation shall be awarded to the prince or his lieutenant. 31 *H. 6. 11.* and the like to the bishop of *Durham*, or chancellor [197] of *Lancaster*.

There was a very sharp, yet useful statute, 2 *H. 5. cap. 9.* "If any person make complaint in the chancery of any felony or riot committed, and that the offender fly or withdraw himself to the intent to avoid execution of the common law, a bill thereof shall be made for the king and delivered to the chancellor, who, (if he be duly informed, that such bill containeth truth,) shall, at his discretion, grant a *capias* to the sheriff of the county where the offence is committed, returnable in chancery at a certain day; and if the persons yield themselves to the sheriff, they shall be committed or bailed, as the case shall require, and it shall be commanded to inquire of the fact, and thereupon to be done, as the law requireth; but if they appear not, then a writ of proclamation to issue to the sheriff returnable in the king's bench, by which it shall be commanded, that he make proclamation in two counties, that the parties appear in the king's bench to answer the matters in the bill, (the substance whereof is to be recited in the writ,) upon pain to be convict of the offense, and if they come not at the day, to stand attaind, and if they come *then*, the fact to be inquired of as above.

"Provided that the suggestion of such riots be testified to the chancellor under the seals of two justices of the peace and the sheriff of the county before the *capias* granted, the substance of the complaint to be exprest in the writ of *capias*, and also in the writ of proclamation." Like provision for the counties palatine.

This is marked as an obsolete statute, but I know no act of parliament that repeals it, unless it be the implication of the statute of 16 *Car.* 1. *cap.* 10. which yet seems not to extend to the repeal of these statutes, for the chancellor hath no power to hear and determine the offenses, but only to grant preparatory process to bring them in to answer according to law, for they are to be proceeded against by indictment, if they appear.

Yet this statute hath not been, that I know of, put [198] in ure. 1. Because it seems doubtful, whether it extends to murders or robberies, unless accompanied with a riot. 2. Because it is left to the discretion of the chancellor to issue the process. 3. Because so many things previous to the process are required, as bill, certificates, probable evidence. 4. Because it takes up so much delay, that they may as soon be taken up by the ordinary way of indictment and process of outlawry. 5. And especially, because in such case the warrant of the chief justice or any other judge of the king's bench, upon oath made touching the offense and the offenders, reacheth all parts of *England*. 6. Because it is so severe, for an innocent person may be convicted upon default of appearance, and yet have had no notice; but in case of an outlawry, tho it be an attainder in itself, yet small exceptions are commonly allowed to the process or return, and so by writ of error usually and easily reversible, and the party put to plead to the indictment.

But certainly it might be of great use to bring in and punish notorious offenders, if issued discreetly and upon great occasions, provided the parties were first indicted by the grand inquest.

Now, for the farther declaring the business of process upon indictments of felony these points are considerable. 1. Who may issue process of outlawry. 2. Against whom it is to be issued in relation to principals and accessaries. 3. What the tenor of the *exigent* and outlawry. 4. What the effect or consequence of either. 5. How avoided either by discontinuance, *supersedeas*, or error,

I. As to the first of these, namely, who may issue process by *capias* and *exigent*.

The court of king's bench either upon an indictment originally taken before them, or removed thither by *certiorari* may issue process of *capias* and *exigent* into any county of *England* upon a *non est inventus* returned by the sheriff of the county, where he is indicted, and a *testatum*, that he is in some other county.

Justices of gaol-delivery regularly cannot issue a *capias* or

exigent, because their commission is to deliver the gaol *de prisonibus in ea existentibus*, so that those, whom they have to do with, are always intended in custody already; *vide supra cap. 5.*

Justices of *oyer and terminer* may issue a *capias* or *exigent*, and so proceed to the outlawry of any person indicted before them, directed to the sheriff of the same county, where they hold their sessions at common law.

But by the statute of 5 *E. 3. cap. 11.* they may issue process of *capias* and *exigent* to all the counties of *England* against persons indicted or outlawd of felony before them.

Justices of peace may make out process of outlawry upon indictments taken before themselves, or upon indictments taken before the sheriff, and returned to the justices of peace by the statute of 1 *E. 4. cap. 1.* but the power of the sheriff to make any process upon indictments taken before him is taken away by that statute.

The process to the outlawry, *viz.* the *capias* and *exigent* must be in the king's name, and under the judicial seal of the king appointed to that court that issues the process, and with the *teste* of the chief justice, or chief judge of that court of sessions.

A man is indicted by inquisition before the coroner, *quare* if he can by law make out process of outlawry; *videtur quodd sic. 27 Assiz. 47. B. outlawry 38.*

II. Against whom process of outlawry shall issue upon an indictment.

Altho in civil actions between party and party regularly a *capias* or *exigent* lies not against a lord of parliament of *England*, whether secular or ecclesiastical, yet in case of an indictment for treason or felony, yea, or but for a trespass *vi & armis*, as an assault or riot, process of outlawry shall issue against a peer of the realm, for the suit is for the king, and the offense is a contempt against him: And therefore, if a rescue be returned against a peer, 1 *H. 5.* or if a peer of parliament be convict of a disseisin with force, *H. 32 Eliz. B. R. Croke, n. 9.* Lord *Stafford's* case,⁽ⁱ⁾ or denies his deed, and it be [200] found against him. *M. 38 & 39 Eliz. B. R. Croke, n. 26.* the earl of *Lincoln's* case,^(k) a *capias pro fine* an *exigent* shall issue, for the king is to have a fine, and the same reason is upon an indictment of trespass or riot, and much more in the case of felony.

In an appeal by writ against principal and accessory, because the writ is general and distinguisheth not which is prin-

(i) *Cro. Eliz.* 170.

(k) *Cro. Eliz.* 503.

cipal and which accessory, the process by *capias* shall go against them all; but if the defendants make default, the plaintiff in the appeal ought to declare which is principal and which accessory before the *exigent* issues, and then the *exigent* shall go only against the principal, and if he distinguisheth it not, but prays an *exigent* against all, he is concluded to charge any as accessory.

But in an appeal by bill or an indictment, the bill or indictment declares which is principal and which accessory, and there indeed the process by *capias* is against them all, but when it comes to the *exigent*, the *exigent* shall issue only against the principal, and process continue by *capias* *infini*te against the accessory, till the principal be outlawd, and then an *exigent* to issue against the accessory, because *then* the principal is attaind by outlawry; and if the accessory appear upon the *capias*, he shall be let to bail, and have *idem dies* by bail till the process be determind against the principal, and this was the common law, but farther settled by the statute of *Westm. 1. cap. 14. 2 Co. Instit. p. 183. and Stamf. P. C. Lib. II. cap. 17. fol. 69 & 70.*

If *A.* and *B.* be indicted as principals in felony, and *C.* as accessory to them both, the *exigent* against the accessory shall stay as before, till both be attaind by outlawry or plea. 40 *Assiz. 25. & 7 H. 4. 36. b.* for it is said, if one be acquitted, the accessory is discharged, because indicted as accessory to both, and therefore shall not be put to answer till both be attaind. 2 *Co. Instit. 183. Plowd. Com. 99. b. dubitatur*; for tho *C.* be accessory to both, he might have been indicted as accessory to one, because the felonies are in law several, but if he [201] be indicted as accessory to both, he must be prov'd so.

4 *Co. Rep. 44. b. Fauze's case, 47. b. Waite's case, 2 Co. Instit. ubi supra*; but *vide 9 Co. Rep. 119. a. lord Sanchar's case contra per totam Curiam.*

Nota the diversity seems to be between an accessory to two principals in an appeal, there he shall not be convict, if he be only accessory to one; but if *A.* and *B.* be indicted as principals, and *C.* be indicted as an accessory to both, if he be found accessory to one, he shall be convicted, because the king's suit; *quære 8 H. 5. 6. b. 9 Co. Rep. 119. a. lord Sanchar's case. (*)*

III. As to writ of *exigi facias*, and the return thereof.

If the defendant render himself to the sheriff before the *quinto exactus*, and appear in court at the return of the *exigent* and plead, and is bailed to attend the trial, and then make default, the inquest shall not be taken by default in any case of

(*) *Vide supra, Part I. p. 624.*

felony, either upon an indictment or an appeal, tho it may in other cases, but a new *capias*, and after *that* an *exigent* shall issue, and a *capias* against the bail. 19. E. 3. *Exigent* 10.

If an *exigi facias* be delivered to the sheriff, and there are but two county-courts before the return, and the sheriff return the first and second *exactus & non comparuit*, and that there were no more county-days between the delivery of the writ to him and the day of the return, there may issue a special *exigi facias* with an *allocato comitatu*, if it be prayed, after the return, and before any new county-day be past, but if any county-day be past between the last of the former county-days and the return, no *exigi facias* shall issue with an *allocato comitatu*, but an *exigi facias de novo*, for the demand of the party must be at five county courts successively held one after another without any county court intervening, 22 E. 3. 11. a. so if after the second *exactus* the offender render himself and finds mainprise, and at the day of the return makes default, *exigi facias* with an *allocato comitatu* shall issue, because three county-days intervened, but a new *exi-* [202]
gent and a *capias* against the bail, 22 E. 3. *ubi supra*, and 32 E. 3. *Exigent* 14.

And therefore in *London*, where the holding of the hustings is uncertain, no *exigi facias* shall issue with an *allocato husting'*, because the court cannot take notice of the set times of holding it, as they may of the times of holding the county-court. 21 E. 3. 35. b. 17 E. 3. 43. b. *Exigent* 11. but *vide contrarium* at this day an *allocato husting'*, H. 19 Jac. B. R. *Archer* and *Dalby*,⁽¹⁾ where it was agreed, that if an *exigent* issues in *London*, and they begin in husting *de placito terræ*, (as they may) they shall proceed along at that hustings to the outlawry, without mingling their hustings *de communibus placitis*; but if an *allocato husting'* comes, they shall proceed without omitting any husting.

If the offender appear at the *capias* and pleads to issue, and is then let to bail to attend his trial, and then make default, the inquest in case of felony shall never be taken by default, but a *capias ad audiendam juratam* shall issue, and if he be not taken, an *exigent*, *vide* 26 Ass. 51 *Coron.* 196. and if he appeared upon the *exigent* and then made default, an *exigi facias de novo* shall issue. 16 Ass. 13.

But, if upon the *capias* or *exigent* the sheriff returns *cepi corpus*, and at the day hath not his body, the sheriff shall be punished, but no new *exigent* awarded, because in custody of record. 30 Assiz. 23. but if the party be returned outlawd, the process thereupon is a *capias uilegatum*.

And that I may say is once for all, as well this process of *capias utlegatum* as all other process upon an indictment, and generally all process for the king are with a *non omittas propter aliquam libertatem*.

And therefore, by virtue of these processes, the sheriff may enter into any liberty to execute the same.

And if the party be in his own house, or in the house of any other, if the doors be shut, and the sheriff having given notice of his process demand admittance and the doors be not opened, he may break open the doors and enter to take the offender. 5 Co. Rep. 91. b. *Semayne's case*, & *libros ibidem*.

Nay farther, if a party outlawd be in a house, and [203] the door be refused to be opened, the constable, or any other person in pursuit of the felon, may break open the doors and apprehend a person outlawd or indicted of felony.

The return of the outlawry must be certain.

It must show where the county-court was held, and in what county, therefore *ad comitatum meum S. tent. apud C.* and says not *in comitatu prædicto* or *in com' S.* is erroneous. 11 H. 7. 10. a. *dubitatur*.

The like if it be *ad comitatum meum tentum apud S. in com' Somers'*, and says not *ad comitatum meum Somers'*, or *ad comitatum Somers'*, without saying *ad comitatum meum Somerset*. P. 7 Jac. B. R. adjudged, *Whiting's case*, (m) 6 H. 7. 15. b. 11 H. 7. 10. a.

And yet in that case at the desire of the king's attorney, in case of an outlawry of felony a *certiorari* issued to the coroners to certify the truth, and thereupon the return was amended according to a like precedent in the time of E. 4. T. 3 Car. B. R. *Plum's case*. (n)

The sheriff must return the day and year of the king to every *exactus*.

If the day and year of the king be inserted in the 1, 2, 3 and 5 *exactus*, but omitted in the 4th *exactus*, it is erroneous, and shall not be supplied by intendment. M. 14 Jac. B. R. *Chapman's case* adjudged. (o)

So if it be *anno regni dominæ reginæ* without saying *Elizabethæ*, or *dominæ Elizabethæ* without saying *reginæ*. P. 7 Jac. C. B. *Burford's case* (p) and *Brandling's case*, (q) or *anno regni domini regis Jacobi* without saying *regni sui Angliæ*, for the year of *England* and *Scotland* differ. H. 7 Jac. Pen's case, (r) so if there be less than a month between

(m) 2 R. A. p. 803. pl. 2.

(n) Palm. 480. Latch 210.

(o) 2. R. A. p. 803. pl. 1.

(p) Ibid. p. 802. pl. 6.

(q) 2 R. A. p. 802. pl. 7.

(r) Ibid. p. 802. pl. 8.

the first and second *exactus*. *H. 13 Jac. B. R. Taverner's case.*(s)

Ad husting tent' apud Guildhall civitatis London without saying *de communibus placitis* is erroneous, because they have two hustings, one *de communibus placitis*, [204] another *de placitis terræ*. 6 *H. 7. 15. b.* 11 *H. 7. 10. a.*

So if an *exigent* be against *A.* and *B.* and the return is *primo exacti fuerunt & non comparuerunt* without saying *nec eorum aliquis comparuit*, it is erroneous. *H. 13 Jac. B. R. Tuverner's case* adjudged,(t) & *sæpius alibi*.

If there be two coroners in a county, the calling upon the *exigent* may be by one of them, and likewise one alone may give the judgment of outlawry. 14 *H. 4. 34. b. per Hankf.* 39 *H. 6. 40. b.*

But it seems the return must be by two in ministerial acts. 14 *H. 4. 34. b.* 39 *H. 6. 40. b.*

The name of the coroner must be subscribed to the judgment of outlawry at the *quinto exactus*. *M. 9 Car. B. R. Elthrington's case* upon an outlawry of felony, and it must be subscribed also by the name of their office *A. B.* and *C. D. coronatores*, unless in *London*, where the mayor is coroner. *M. 13 Jac. B. R. Earle's case.*(u) *P. 17 Jac. Croke, n. 11. Garrard's case.*(x)

The sheriff's name and office must also be subscribed to the return of the *exigent*, *e. g. A. B. armiger vicecomes*.

IV. As to the effect of the *exigent* or outlawry in treason or felony.

1. As to the *exigent* the very issuing of the writ of *exigent* in case of treason or felony gives to the king or the lord of a franchise, to whom that liberty is granted, the forfeiture of all the goods of the party so put in *exigent* from the time of the *teste* of the writ of *exigent*. 41 *Assiz. 13.*

And therefore, if in an appeal the *exigent* be well awarded, tho the writ of appeal be abated, the forfeiture of the goods by the *exigent* stands in force. 43 *E. 3. 17. b. Stamf. P. C. Lib. III. cap. 22. fol. 184. b.*

And tho the outlawry be reversed for error in law or in fact, as if the party were imprisoned at the time of the outlawry and after the *exigent*, whereby the outlawry is reversed, yet the *exigent* being well awarded the forfeiture of the goods stands. 19 *E. 3. Forfeiture 19.* [205] 30 *H. 6. ibid. 31.*

And therefore a special writ of error lies even upon the

(s) *Ibid. p. 802. pl. 5.*

(t) 2 *R. A. p. 802. pl. 1.*

(u) *Ibid. p. 802. pl. 3 & 4.*

(x) *Cro. Jac. 531.*

award of the *exigent* for the party so put in *exigent* or his executors to reverse the award of the *exigent*, if it were erroneously awarded for error in law or error in fact. *M. 33 & 34 Eliz. B. R. Marshe's case adjudged*, cited in *Foxley's case*, 5 *Co. Rep.* 111. *a.* but not without reversal by writ of error. *Ibid.* As if he were in prison, or beyond the sea, or had a charter of pardon before the *exigent* awarded, and thereupon the very award of the *exigent* shall be reversed, and the party restored to his goods, and so it is for matter of law, as if the *exigent* issued against the accessary before the principal attainted. *Stamf. ubi supra.*

But the avoiding only of the outlawry avoids not the *exigent* if well awarded, nay altho the party render himself after the *exigent* awarded, and plead to the indictment, and is found not guilty, yet the forfeiture by the *exigent* stands in force. 22 *Assiz.* 81.

Therefore it is necessary for a party outlawd in felony to bring his writ of error specially *tam in adjudicatione brevis de exigi facias, quàm in promulgatione utlegariæ*, for tho the outlawry be reversed, it doth not reverse the award of the *exigent*.

But error in the *exigent* is cause to reverse the outlawry, and error in the appeal or indictment, upon which the *exigent* is awarded, is cause to reverse both outlawry and *exigent*.

But without a judgment of reversal in a writ of error the forfeiture by the *exigent* awarded stands, tho the indictment be quashed or the appeal abated, because the king's title being of record must be avoided by a record, and so are the books of 41 *Assiz.* 13. 43 *E.* 3. 17. *b.* to be reconciled, *vide Foxley's case, ubi supra.*

2. As touching the forfeiture by outlawry. Outlawry of treason or felony is a conviction and attainder of the offense charged in the indictment.

And as the award of the *exigent* gives the forfeiture [206] of the goods, so the outlawry gives the forfeiture or loss of the lands of the party outlawd, *viz.* in case of outlawry of treason his lands are forfeited to the king, of whomsoever they are held, and in case of outlawry of felony to the lord by escheat, of whom they are immediately holden.

But it must be remembred, that the bare judgment of outlawry by the coroners without the return thereof of record is no attainder, nor gives any escheat. *Co. Lit.* § 197. *fo.* 128. *b.* 28 *Assiz.* 49.

But it must be returned by the sheriff with the writ of *exigi facias*, and the return indorsed.

And therefore, if there be a *quinto exactus*, and thereupon *utlegatus est per judicium coronatorum*, but no return thereof is made, there lies a writ of *certiorari* to the coroners, 9 *H.* 4. 7. *b.* 36 *H.* 6. 24. *b.* *Dy.* 223. *a.* or to the sheriff and coroners, *Register* 284. *a.* 38 *E.* 3. 14. *b.* *vide Dy.* 317. *a.* to certify the outlawry into the king's bench, but this is only either to ground a charter of pardon upon it, 9 *H.* 4. 7. *b.* or to amerce the sheriff, where he returned only a *quarto exactus* when it was *quinto exactus*, 36 *H.* 6. 24. *b.* but of what effect it is otherwise, there seems diversity of opinions: I think as followeth.

1. That it doth not disable the party to bring an action, because in relation to party and party it stands as nothing, till returned by the sheriff. *Mich.* 14 & 15 *Eliz.* *Dy.* 317. *a.* *Puttenham's* case.

2. That consequently, barely upon such a return of an outlawry upon a *certiorari*, without the writ of *exigent* indorsed and returned together with the *certiorari*, it seems no writ of escheat lies for the lord; *quære.*

3. But if the writ of *certiorari* be directed to the sheriff and coroners, and the writ of *exigent* be extant in court, and they return this outlawry, possibly this may be a sufficient warrant to enter it of a record, as a return upon the *exigent*, for the king's advantage, and to issue upon it a *capias utlegat'*. 38 *E.* 3. 14. *b.* to have the forfeiture of his goods. 14 & 15 *Eliz.* *Dy.* 317. *a.* *Co. Lit. fol.* 288. *b.* 37 *H.* 6. 17. *a.* *vide Proctor's* case. *P.* 5 *Eliz.* *Dy.* 223. *a.* And *Stanley's* case [207] there cited out of 18 *E.* 4. to this purpose.

4. But unless the writ is some way returned or extant, I think it gives the king no title to land or goods, for the writ of *exegi facias* is the warrant of the outlawry, and *that* which gives the coroners their authority in such a case to give judgment of outlawry.

And it is not like the case, where there was once a writ and return of outlawry, and the record since lost, for that upon circumstances a jury upon the general issue may find a record, tho not shewn in evidence; but here the writ was never in truth indorsed nor returned.

5. But if the writ of *certiorari* were directed to the coroners alone, tho it may be a ground to cause the sheriff to mend his return and make it according to the truth, yet the certificate of the coroners will not make a record to intitle the king or lord to any thing without the writ of *exigent* extant, and the return upon it amended by the sheriff, for without the *exigi facias* and the return of the outlawry upon it, I think there is neither disability, forfeiture, nor escheat, and therefore *P.* 8 *Jac. C. B.* a

certiorari shall not be so much as granted to the coroners to remove an outlawry after the parties death. Sir *John Fit's* case.

V. Touching the avoiding of the outlawry, it is to be done either by plea or by writ of *identitate nominis*, or by writ of error.

1. By plea, where the record of the outlawry is not avoided but made good against another person, as where the outlawry is against *J. S. de B.* and the party taken upon it is another person of another addition, as *J. S. de C.* or *J. S. junior*, &c. *vide* 19 *H.* 6. 58. *a.* 10 *E.* 4. 16 *a.* 20 *H.* 6. 19. *a.*

2. By writ of *identitate nominis*, *vide* *F.N.B.* 267. 20 *E.* 3. *Brief* 683. 14 *H.* 4. 27. *a.*

3. By writ of error, for it is a judgment of record and must be avoided by record.

The errors assignable are either errors in law, whereof before, or errors in fact, which are many, as if the party outlawd were an infant under fourteen years old in case of felony. *Dy.* 104. *b.* 3 *H.* 5. *Utlagarie* 11.

So if he were imprisoned at the time of the outlawry, unless being brought to the bar and demanded, if he will appear, and he refuse it. *M.* 8 *Jac.* *C. B.* 1 *H.* 7. 13. 21 *E.* 4. 73. *b.*

As touching avoiding of an outlawry of felony, because beyond the sea. *H.* 15 *Jac.* *B. R.* *Carter's* case, ^(y) these differences were agreed by the court, whereby the differing books are reconciled upon view of divers precedents.

1. If a man having committed a felony goes beyond the sea voluntarily, or upon his own occasions, and not in the king's service before any *exigent* awarded, tho after the indictment, and then an *exigent* is awarded, and the offender being beyond the sea is outlawd for the felony, he may assign it for error.

2. But if after the *exigent* awarded upon the indictment of felony, then he goes beyond the sea voluntarily or upon his own occasions, and being so beyond sea is outlawd, he shall not avoid it by such being beyond sea, because the *exigent* awarded gives him notice of the prosecution, and by such a means he may avoid his conviction by staying till all the witnesses are dead.

3. But if *primâ facie* the error in that case is well assigned, by alleging he was *ultra mare tempore promulgationis utlagariæ*, and if he were in the realm after the *exigent* issued, it shall come in by the plea of the king's attorney to show it.

4. But if he were within the realm at the time of the *exigent* issued, and went beyond sea upon the service of the king or kingdom, and then is outlawd being beyond sea, this outlawry

(y) 2 *R. A.* 504. *pl.* 2, 3, 4, 5.

shall be reversed, and if the party allege generally, that he was *ultra mare tempore promulgationis utlegariæ*, and the king's attorney reply, that he was in *England tempore emanationis brevis de cægi facias*, it is a good replication for the plaintiff in the writ of error to allege, that he went out after the *exigent* and before the outlawry pronounced upon the king's command or service, and show it specially, and so confess and avoid the plea.

And it is to be observed, that altho the death of the king doth not discontinue the indictment, yet the king's [209] death pending the process and before the outlawry discontinues the process, and this is not aided by the statute of 1 E. 6. cap. 7.

Upon a writ of error upon an outlawry in felony, the record of the outlawry *cum omnibus ea tangentibus* is removed into the king's bench, wherein these things are observable.

1. That the party outlawd must render himself in custody, and in custody must come in person to the bar, and when he is demanded what he can say, he is in person to pray allowance of the writ of error.

2. The writ being allowd the record is to be removed, namely the indictment, process, and return, and outlawry, he is then to assign his errors in person, and a day is given to the king's attorney to reply to him, and in the mean time a *scire facias* to the lord's mediate and immediate is to issue returnable at fifteen days *ad audiendum errores*.

3. If any lords do appear, they may plead to the errors; if the sheriff return there are no lands, &c. then the court proceed to examine the errors.

4. The outlawry being reversed he is put to answer the indictment, and may plead to it, and be tried at the king's bench bar, or the record may be remitted into the country, if it were removed into the king's bench by *certiorari*, with a command to the justices below to proceed by the statute of 6 H. 8. cap. 6. *de quo supra*, p. 3.[1]

[1] Process is so denominated because it *proceeds* or issues forth in order to bring the defendant into court, to answer the charge preferred against him, and signifies the writs or judicial means by which he is brought to answer. *Dalt. Jus. c.* 193; 5 *Burn's Jus.* 659. That proceeding which is called a warrant before the finding of the bill, is termed process when issued after it has been found. When an authority of oyer and terminer is granted, the power to issue process is incidentally given; for as there can be no inquiry respecting offences, without the presence of the party, wherever the power is entrusted of determining the former, there must also be authority to compel the latter. *Com. Dig. Process*, A. 1. For the same reason, justices of the peace, whenever they are authorized to inquire, hear, and determine, may thus compel the defendant to appear. *Dalt. c.* 193. p. 471. The object of process being to compel an appearance, there can be no necessity for it when the defendant is present in court. 2 *Hawk. c.* 27. s. 1.

If therefore an indictment be found in the king's bench against a party already in custody, he may be brought up and charged with the indictment; but if the defendant, not being in actual custody, voluntarily appear in court, it is discretionary, and not obligatory in the court to detain him; but they may leave him to be taken by the ordinary legal process. *Burr.* 2591. Process, when it issues from the court of King's Bench is tested by the chief justice, or in case of a vacancy, by the senior judge. 2 *Hawk. c. 27. s. 8.* If it be issued from any other court it ought to be tested by the first in the commission; and even though a single magistrate may not have authority to determine an indictment, it seems he may thus authorize the process. 2 *Hawk. c. 27. s. 8.* At common law, and by the practice of the courts, the usual mode of bringing a defendant into court upon an indictment found against him, when it was not considered necessary to pursue him to outlawry, was by writ of *capias*, which all courts having power to try, are also authorized to issue; and unless in proceedings to outlawry or against peers, corporations, &c. no previous process seems to have been necessary. 4 *T. R.* 694; 2 *H. Bl.* 419; 4 *Bl. Com.* 319. It seems also to be the practice upon an indictment found for a misdemeanor during the assizes or sessions to issue a bench warrant signed by a judge or justices of the peace, or two of the latter, to apprehend the defendant. 2 *Hawk. c. 27. s. 8*; *Cowp.* 289; 8 *T. R.* 110; and when the assizes and sessions are over, the clerk of the assize and clerk of the peace respectively will, on the application of the prosecutor, grant a certificate of the indictment having been found, upon which any judge of the king's bench or justice of the peace of the proper county will grant a warrant for apprehending the defendant, and will oblige him to enter into a recognizance to answer, or for want of sureties will commit him. 5 *Burn's J.* 661. The statute 26 *Geo. III. c. 77. s. 18.* in case of obstructions of revenue officers, provides, that any judge or justice of the peace may grant his warrant upon indictment found to apprehend the offender, and either to hold to bail or commit him. And by the 35 *Geo. III. c. 96.* some further regulations are made relative to the subsequent treatment of persons so indicted, by which the prosecutor may, after delivery of a copy of the indictment, enter an appearance for them, and proceed to trial if they refuse to attend. These provisions were by the 48 *Geo. III. c. 58. s. 1.* extended to every species of crime below the degree of felony, when prosecuted by indictment or information in the king's bench. When the defendant is brought into court upon the warrant, or upon a *capias* in case of felony, he is either to be committed or bailed to appear and answer at a subsequent sessions or assizes. The defendant must continue in custody although the prosecutor removes the indictment by *certiorari* unless he find bail, though if he had found bail, such removal would have discharged his recognizance. 2 *Leach*, 560. If a defendant appear to an indictment of felony, and afterwards before issue joined make an escape either from his bail or from prison, the common *capias*, *alias*, and *pluries*, shall be awarded against him, unless there had been an *exigent* before, in which case a new *exigent* shall be awarded. 2 *Hawk. c. 27. s. 19.* In the execution of process against any man in the case of a misdemeanor, it is necessary to demand admittance, before the breaking of the outer door of the house can be legally justified; but it is questionable if it be so in the case of felony. *Launock v. Brown*, 2 *B. & Ald.* 592; *Burdett v. Abbott*, 14 *East*, 163.

By the act of Congress of May 8, 1792, it is enacted, That all writs and processes issuing from the Supreme or a Circuit Court, shall bear test of the Chief Justice of the Supreme Court, or (if that office shall be vacant) of the Associate Justice next in precedence; and all writs and processes issuing from a district court, shall bear test of the judge of such court, or (if that office shall be vacant) of the clerk thereof, which said writs and processes shall be under the seal of the court from whence they issue and signed by the clerk thereof.

By the 22d sect. of the act of 30 April, 1790, if any person or persons shall knowingly and willingly obstruct, resist, or oppose any officer of the United States in serving or attempting to serve or execute any mesne process, or warrant, or any rule or order of any of the courts of the United States, or any other legal or judicial writ, or process whatsoever, or shall assault, beat, or wound any

officer, or other person duly authorized in serving or executing any writ, rule, order, process or warrant aforesaid, every person so knowingly and wilfully offending in the premises, shall on conviction thereof, be imprisoned not exceeding twelve months, and fined not exceeding three hundred dollars. See *U. S. v. Lowry*, 2 Wash. C. C. R. 169.

One George Milburn was imprisoned in the jail of the county of Washington upon a bench warrant, issued by the Circuit Court of the United States for the District of Columbia, to answer an indictment pending against him for keeping a faro bank. He had been arrested on a former *capias* issued on the same indictment, upon which he gave a recognizance of bail with sureties, in the sum of a hundred pounds, Maryland currency, according to the statute of Maryland; conditioned to appear in court at the return day of the process, &c. He did not appear, and the recognizance was forfeited, and a *scire facias* was issued against him and his sureties returnable to December Term, 1833. At the same term another writ of *capias* was issued against him, returnable immediately, and returned *non est inventus*. At June vacation, 1834, another writ of *capias* was issued against him, returnable to November Term, 1834, on which he was arrested, and from which arrest he was discharged on a *habeas corpus* by the Chief Justice of the Circuit Court; on the ground that the writ of *capias* improperly issued. On a return of this discharge by the marshal, a bench warrant was issued by order of a majority of the Judges of the Circuit Court, and on which he was in custody. He applied for a writ of *habeas corpus* to the Supreme Court, to obtain his discharge. The court held that he was properly in custody, and refused the rule for a *habeas corpus*. *Ex parte Milburn*, 9 Peters, 704. As to the learning relating to the process of outlawry, see 5 *Burn's Jus.* 663. The process of outlawry is very little known in the United States. For the laws relating to it in Pennsylvania, see 1 *Smith's Laws*, 116, 3 *id.* 37. There is no outlawry in that State, in civil cases; *Dilman v. Skulz*, 5 S. & R. 35. In the State of New York it is abolished in civil actions, and also in criminal cases, except treason. 2 *N. Y. Rev. Stat.* 553, 745. It is unknown to the laws of Kentucky, *Sneed v. Weister*, 2 *Marsh.* 278; and of North Carolina, *Sherrod v. Davis*, 1 *Hayn.* 284. It is regulated by statute in Virginia; see *Davis' Virg. C. L.* 437.

CHAPTER XXVII.

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TOUCHING CERTIORARI OUT OF THE KING'S BENCH.

THO a writ of *certiorari* be not properly or directly a process upon an indictment, yet it has relation to it, and in order to the full understanding of the pleas of the crown is necessary to be considered.

The king's bench is the sovereign ordinary court of justice in causes criminal, and therefore may issue a *certiorari* unto inferior justices to remove indictments or appeals, and that is done for several ends.

1. Sometimes to consider and determine the validity of indictments, and to quash or affirm them, as there is cause.

2. Sometimes to have the prisoner or offender tried either at

the bar, or by *nisi prius* before the king's justices of the courts of *Westminster*.

3. Sometimes to examine, and affirm or reverse the proceedings and judgments given by inferior judges, for it was frequent heretofore to have the record removed by *certiorari* first, and then a writ of error, *quod coram vobis residet*, tho it is now ordinarily done together by writ of error.

4. Sometimes to plead the king's pardon.

5. Sometimes to issue process of outlawry against the offender in those counties and places where the process of inferior justices cannot reach them.

Tho this be usual to remove records of indictments by *certiorari*, yet the chancellor may deliver an indictment removed before him, or the justices of peace, or other commissioners of *oyer* and *terminer* or gaol-delivery and may deliver indictments taken before them *manibus propriis* without writ, and such a record so removed, and a record made of it removes the record.

If there be an indictment to be removed and the party be in custody, it is usual to have an *habeas corpus* to re-
[211] move the prisoner, and a *certiorari* to remove the record, for as the *certiorari* alone removes not the body, so the *habeas corpus* alone removes not the record itself, but only the prisoner with the cause of his commitment, and therefore altho upon the *habeas corpus* and the return thereof the court can judge of the sufficiency or insufficiency of the return and commitment, and bail or discharge, or remand the prisoner, as the case appears upon the return, yet they cannot on the bare return of the *habeas corpus* give any judgment, or proceed upon the record of the indictment, order or judgment, without the record itself be removed by *certiorari*, but the same stands in the same force it did, tho the return should be adjudged insufficient, and the party discharged thereupon of his imprisonment, and the court below may issue new process upon the indictment, tho it be otherwise in an *habeas corpus* in civil causes, for it is a *supersedeas*, and closeth up the hands of the inferior court in civil causes.[1]

By the statute of 1 & 2 of *P. & M. cap. 13.* an *habeas corpus* or *certiorari* to remove a prisoner or a recognisance ought to be signed with the proper hand of the chief justice, or in his absence by one of the justices of the court, out of which it issues.

By the statute of 21 *Jac. cap. 8.* all *certiorari's* to remove indictments before justices of the peace, shall be delivered at the quarter-sessions in open court, and the party indicted shall be-

[1] *R. v. Duchess of Kingston, Corp. 263; R v. Bethel, Salk. 149.*

come bound with sufficient sureties in ten pounds to the prosecutor, with condition to pay him such charges as the justices of peace shall assess, if the party be convicted, otherwise the justices of peace may proceed to trial notwithstanding such *certiorari*.

A *certiorari* may issue to the justices of a county palatine, or to the mayor of the *cinque ports* to remove an indictment taken before them, and must not be directed to the chancellor of *Durham*, &c. or warden of the *cinque ports*, for now by the statute of 27 H. 8. cap. 24. all commissions of the peace, gaol-delivery, *oyer* and *terminer*, &c. are to be made in the king's name, and these justices in criminal causes are immediately subject to this court, as other justices of like nature else- [212] where are; and if they return a privilege of the county palatine or *cinque ports* upon the *certiorari*, it shall not be allowed, but an *alias certiorari* shall issue with a precept to produce their charters, by which they claim such exemption, P. 43 Eliz. B. R. Rot. 119. T. 8 Car. B. R.(a) and M. 8 Car. B. R.(b) upon an indictment of sodomy in the *cinque ports*. T. 1653. *Rutabie's* case upon an indictment of murder in *Durham*.(c)

A *certiorari* issues bearing *teste* the last day of *Trinity term* to remove all indictments against *A.* and *B.* returnable *tres Michaelis*; at the quarter-sessions it is delivered, and then an indictment is found against *A. B.* and *C.*

Ruled 1. That tho the delivery of a *certiorari* supersedes the proceeding upon an indictment, yet it doth not hinder the taking of an indictment after the delivery of the writ.

2. Altho the indictment be taken after the *teste* of the *certiorari*, and before or after the delivery thereof, yet all such indictments against *A.* and *B.* ought to be removed, and the justices below cannot proceed upon such indictments to trial, judgment, or execution; and if they do, it makes their proceedings erroneous and void, and likewise subjects the justices to an attachment for the contempt, whether they proceed at the same sessions, or a private sessions after.

3. That such a *certiorari* to remove all indictments against *A.* and *B.* removes all indictments wherein *A.* or *B.* are indicted either alone or together with any other person. M. 22 Car. 1. B. R. *Orfener's* case(d) adjudged. 1 R. 3. 4. b. 6 H. 7. 16. a.

If *A. B.* and *C.* are indicted (suppose for a battery,) ruled, 1. Tho *A.* alone tenders security for the costs, it is sufficient

(a) *Hopkil Tilden's* case, 1 R. A. 395. pl. 6.

(b) *Dugdale's* case. *ibid.*

(c) *Vide supra*, Part I. p. 467. and also *Simpson's* case, 1 R. A. 395. pl. 5.

(d) The same points resolved in *Cheney's* case, 1 R. A. 395. pl. 1, 2.

within the statute, and the record ought to be removed into the king's bench. 2. If the indictment be at a private sessions, this indictment ought to be delivered into the quarter-sessions, yet the delivery of the *certiorari* at the private sessions [213] closeth the the hands of the justices, altho the allowance of the writ and the tender of the security must be by the statute at the quarter-sessions. *M. 1653. B. R.* adjudged.

Nota, T. 15 Car. 1. B. R. in *Hancock's* case these points were resolved. 1. That if many are indicted, and one only tenders sureties for the costs upon the statute of 21 *Jac.* it is sufficient.

2. If the surety be sufficient as to 10*l.* that is a sufficient surety, and ought to be allowed by the justices of peace.

3. A *feme covert* is not within the statute of 21 *Jac.* to find sureties.

4. If a *certiorari* issue and ought to be allowed, the proceeding of the justices after is *coram non judice*.

5. It was resolved *M. 4 Car.* that the removal of an indictment of forceable entry by the prosecutor is not within the statute of 21 *Jac.*

And so note a difference between a writ of error and a *certiorari*, the former is a *supersedeas* to the issuing of execution from the time of the delivery of the writ till the day of the return be past, but then if the plaintiff proceed not to the removal of the record, execution shall be granted for his delay; but a *certiorari* is a *supersedeas* from the time of the delivery thereof for ever, unless a *procedendo* issue. 21 *H. 6. 28. b. Dy. 345. a.*

If at the sessions of the peace an indictment of forceable entry be, and restitution be awarded, and after the sessions and before restitution actually made a *certiorari* is delivered to one justice of peace, before the statute of 21 *Jac.* it closed up their hands, and no restitution shall be awarded, but the justice ought to make a *supersedeas* thereupon.

And it seems the same law still remains at this day upon indictments of forceable entry found at private sessions, because the justices make execution thereupon before any quarter-sessions come by virtue of the statute of 8 *H. 6. cap. 9.* and if the *certiorari* should not be obeyed, it would be fruitless.

If *A. B. C.* and *D.* be actually indicted in one indictment for one offense, and a *certiorari* be to remove all indictments against *A.* and *B.* this will be sufficient to remove the indictment against *A.* and *B.* and also it removes the indictment as to *C.* and *D.* for the justices may deliver the indictment *per manus proprius*, *M. 37 & 38 Eliz. B. R. Woodward's case, contra 6 E. 4. 5. a.*

But if the indictment be but one, but the offenses several, as if *A. B. C.* and *D.* be indicted by one bill for keeping several disorderly houses, a *certiorari* to remove this indictment against *A.* and *B.* removes not the indictment as to *C.* and *D.* for tho they are all comprised in one bill, yet they are several indictments and several offenses, and so the record is in the king's bench virtually and truly as to *A.* and *B.* but as to *C.* and *D.* the record remains below.

But if the justices *per manus suas proprias* deliver the bill into court against all of them as they may, then if a record be made of that delivery, the indictment is entirely removed against *A. B. C.* and *D.* because not done upon the writ of *certiorari*, but *per manus suas proprias*: But otherwise it is, where the offenses are several, and the indictment against *A.* and *B.* is removed by writ, and by a return indorsed upon the writ, for then that single indictment, that concerns *A.* and *B.* is removed, and not the others, where the offenses are several, and severally charged.

But as I said, if there be one indictment against *A. B. C.* and *D.* for one murder or burglary, another against the same persons for robbery, and a third against the same persons for a rape, a *certiorari* to remove all indictments against *A.* and *B.* removes all these several indictments against *A. B. C.* and *D.* for tho in law each of them be severally a felon, yet inasmuch as they are jointly charged they shall be all removed as to *A. B. C.* and *D.* by virtue of this one writ, contrary to the opinion of *Markham. 6 E. 4. 5. a.*

And yet in some cases variance between the *certiorari* and the record causeth the record not to be removed, as if the *certiorari* be to remove the record of an inquisition *in curiâ nostrâ*, whereas it was *in curiâ* of the predecessor, the record is not removed. *3. Eliz. Dy. 206. b.*

So if it be to remove an indictment for stealing of two horses, and the record is but for one. *3 Assiz. 3. [215] Plow. Com. 393. a.*

If a *certiorari* issue, it is a *supersedeas* in law, and it makes judicial proceedings after the *certiorari* delivered erroneous, but possibly it makes ministerial proceedings, as the award of restitution in a forceable entry, void also; *vide 6 H. 7. 16 a. per Keble*, although it doth not remove the record before the return. *Dy. 245. a.*

After a *certiorari* issued and delivered, and before the record removed the inferior judge may be enabled to proceed by a *procedendo* or *supersedeas* of the *certiorari* issuing out of the court of king's bench.

But if the record be removed and filed in court, at common

law no *procedendo* could be granted, neither could the record be remitted, but now by the statute of 6 *H. 8. cap. 6.* the court of king's bench may remand the record, and command the judges below to proceed upon the indictment so remitted.

And note the difference between a *certiorari* in the king's bench and chancery: In the king's bench the very record itself is removed, and that which remains in the court below is but a scroll. But usually in chancery, if the *certiorari* be returnable there, they remove but the tenor of the record, and therefore if the tenor of a record of an indictment, or attainder, or conviction be removed by *certiorari* into the chancery, and thence sent by *mittimus* into the king's bench, they cannot thereupon proceed either to judgment or execution, because they have only the tenor of the record before them, and not the record itself, as in the former case. *Vide 37 H. 6. 17. 39 H. 6. 4. Dy. 217. a. 2 E. 3. 21. a.(c)[2]*

(c) *Vide Dyer 369. b.*

[2] A *certiorari* is an original writ, issuing out of the Court of Chancery or the King's Bench, directed in the king's name to the judges or officers of inferior courts, commanding them to *certify* or to return the records or proceedings in a judicial matter depending before them, to the end that the party may have the more sure and speedy justice before the king, or such justices as he shall assign to determine the cause. 1 *Bac. Abr. Certiorari, A.; Com. Dig. Certiorari.* The court of King's Bench having a general superintendency over all courts of inferior jurisdiction, may award a *certiorari* to remove the proceedings from any of them, except some particular statute or charter invest them with absolute judicature. 2 *Hawk. c. 27. s. 22; Carth. 494; 12 Mod. 386.* If there be an indictment to be removed, and the defendant be in custody, it is usual to have a *habeas corpus* to remove him, and a *certiorari* to remove the record, for without the former the defendant must continue in the same custody. *R. v. The Duchess of Kingston, Cowp. 283; Rep. temp. Hard. 371; Salk. 149.* On a removal of an indictment, the trial will be either at bar or at nisi prius, by a jury of the county out of which the indictment is brought; 4 *Bl. Com. 320*; and if a fair trial cannot be had in such county, the court will, on a suggestion entered on the record, order it to be tried in the next adjoining one. *Burr. 1330; 6 T. R. 195.* On the part of a defendant, this writ is often of great importance; as for the purpose of obtaining the judgment of the court as to the validity of the proceedings, and to have a decision of the superior court on a demurrer. *Cowp. 460.* So also to enable him to plead a pardon. 4 *Bl. Com. 320.* And as an inferior court cannot, in criminal cases, grant a new trial upon the merits, but only for irregularity in the formal proceedings, this advantage may be gained by the removal. 13 *East, 416; Dougl. 380; Str. 113, 392; Fost. 198.*

Except where a statute otherwise directs, this writ lies in all judicial proceedings in which a writ of error does not lie, and it is a consequence of all inferior jurisdictions enacted by act of parliament to have their proceedings returnable in the king's bench. *Groenvelt v. Burwell, Ld. Raym. 469; R. v. Inhab. of — in Glamorganshire, id. 580; R. v. Justices of Cashibury, 3 D. & R. 35.* And therefore a *certiorari* lies to justices of the peace, even in such cases which they are empowered by statute finally to hear and determine, and the superintendency of the court of King's Bench is not taken away without express words. 2 *Hawk. c. 27. s. 23; R. v. Jukes, 8 T. R. 542; R. v. Moreley, Burr. 1040.* Where a new

offence is created by statute and directed to be tried in an inferior court, if such court be established according to the course of the common law, all the common law consequences attach upon the proceedings, one of which is, that the indictment may be removed into the court of King's Bench. *R. v. Hube*, 5 T. R. 542; *R. v. Wordley*, 4 M. & S. 508; see *Hartley v. Hooker*, *Cowp.* 524; *R. v. Rogers*, 5 B. & Ald. 773. But where the proceedings are under a statute, by a clause of which the writ of *certiorari* is taken away, the court have no power to issue such a writ, although the inferior court may have proceeded informally. *R. v. Casson*, 3 D. & R. 136; 11 Ad. & Ell. 202, n.; 3 Per. & Dav. 111; 11 Ad. & Ell. 194. Nor will the court in such a case directly or indirectly in any manner enable a defendant to remove proceedings before it. See *R. v. Eaton*, 2 T. R. 472; *R. v. Justices of Yorkshire*, 1 Ad. & Ell. 563. Nor will they interfere so as to review the proceedings by mandamus. *R. v. Yorkshire*, 5 B. & Ad. 1003; 3 Nev. & M. 83. But an enactment taking away the writ of *certiorari*, does not extend to cases where the court below has no jurisdiction. See *R. v. Inhab. of Derbyshire*, 2 Ld. Kenyon, 209; *R. v. Fowler*, 1 Ad. & Ell. 836; *R. v. Somersetshire*, 6 D. & R. 469; 5 B. & C. 816; 1 Burn's Just. 555.

A *certiorari* does not lie to remove other than judicial acts; it therefore does not lie to remove a mere order of court, or warrant of apprehension issued by a magistrate. *R. v. Lloyd*, *Oald.* 309; see the cases collected, 1 Burn, 556.

The writ lies to remove indictments from inferior criminal jurisdictions, before verdict. At the instance of the crown the writ is demandable of absolute right, and the court has no discretion to exercise. *Burr*, 2458; 2 T. R. 89. But it is left to the discretion of the court either to grant or deny it at the prayer of the defendant. *R. v. Lewis*, *Burr*, 2456; 2 Hawk. c. 27. s. 27. And in the exercise of their discretion it is seldom granted when the offence charged against him is serious, and particularly affecting the public. *R. v. Pusey*, *Str.* 717; *R. v. Haywood*, 4 Jurist, 413. As to removing an indictment of murder, see *R. v. Mead*, 3 D. & R. 301; *R. v. Thomas*, 4 M. & S. 442; or for an unnatural crime, see *R. v. Holden*, 2 Nev. & M. 167; 5 B. & Ad. 347; for a felony, see *R. v. Penpraze*, 4 Id. 575; 1 N. & M. 312. The court will grant the writ when they are satisfied by affidavit that any difficult point of law is likely to arise at the trial more fit to be discussed by a superior tribunal. *R. v. Meule*, 5 Ad. & Ell. 539; *R. v. Morton*, 1 Dowd. N. S. 543; *R. v. Warrinaby*, 2 Ad. & Ell. 435; *R. v. Josephs*, 8 Dowd. 128. Also if it be shown by affidavit that there is a probability of partiality or unfairness in the trial, the *certiorari* will be granted. *R. v. Lewis*, *Str.* 704; *R. v. Fvole*, *Ld. Raym.* 1452; *R. v. Waddington*, 1 East, 167; *R. v. Hunt*, 3 B. & Ald. 444; *Rohan v. Triver*, 4 Jurist, 292. But a very strong case must be made out, see *R. v. Mathews*, 1 Chit. Rep. 751; *R. v. Jacobs*, 3 Jur. 999. If the prosecution seem to rest on slight foundation, or it be doubtful whether in point of law it be sustainable, and the defendant's general character be good. *R. v. Wells*, *Str.* 549; *Nehuff's case*, *Salk.* 151; or if the prosecution seem to originate in malice, 1 *Barnard*, 41; or where there has been vexatious delay, and by reason of the absence of the judges a trial has not been obtained, *R. v. Morgan*, *Str.* 1049; *R. v. Ferguson*, *Rep. temp. Hardw.* 370, the writ will in general be allowed. In general, a mere informality in a conviction or order having no reference to the merits of the case, ought not of itself to be the inducement for removing it, but that inducement ought to be of some substantial defect in the justice and legality of the proceeding itself. *R. v. Justices of Denbighshire*, 1 B. & Ad. 616. The conduct of the party applying for the writ may frequently be taken into consideration. *R. v. South Holland Drainage Committee*, 8 A. & E. 429. Pending an appeal, a *certiorari* will rarely be granted; and if granted, it may be quashed. *R. v. Sparrow*, 2 T. R. 196. n. The writ will never be granted to remove an indictment after conviction, unless for some special cause; as where the judge below is doubtful what judgment to give, &c. 2 Hawk. c. 27. s. 31; *R. v. D. Jackson*, 6 T. R. 145; see 1 B. & C. 142; 2 D. & R. 209; 3 Id. 388; 6 Jurist, 1039; 7 Dowd. 578. If the application be neglected until too late, the only course left to the party is a writ of error, under which, however, defects only apparent on the face of the indictment can be taken advantage of. *R. v. Seton*,

7 T. R. 373; *R. v. Pennagoes*, 1 B. & Cress. 142; 2 D. & R. 209. As to the mode of obtaining the writ; see 1 Burn's J. 562.

The writ must not materially vary in its description of the record which it is intended to remove. 2 Hawk. c. 27. s. 75. If it profess to remove an indictment only, it will not be effectual to remove the whole record after conviction. *R. v. Dixon*, *Ld. Raym.* 971. And even more formal objections have sometimes been held to be material, see 1 Chit. C. L. 387. It ought to be directed to the judge or magistrates of the inferior court, before whom the proceedings were originally taken. *Sir T. Biddolf v. Sir C. Clerk*, 3 Keb. 13; 2 Hawk. c. 27. s. 38. Though in some cases it may be directed to the proper officer known to have the actual custody of the record. *Dyer*, 163. The effect of the writ is to remove all proceedings of the nature described therein, which have taken place between the tests and return. The inferior court or justices below are bound to obey the writ after production of it, and notice to them in fact of such production when sitting in their judicial capacity; and after that all further proceedings before them on the matter are erroneous and *coram non judice*. *R. v. Battems*, 1 East, 298. *Cress v. Smith*, Salk. 148. *Ld. Raym.* 836. 2 Hawk. c. 27. s. 57. It operates as a *superseas* from the time of its being actually delivered, and not from the time of its being issued. *R. v. Inhab. of Seton*, 7 T. R. 373; and it will altogether lose its effect if not delivered before its return. *Id.* 2 Hawk. c. 27. s. 59. If an indictment be removed after issue joined, and afterwards remanded, the inferior courts may proceed to trial upon it in the same way as if the writ had never been awarded. *Id.* c. 27. s. 61. But if they go on after the delivery of the writ, when such conduct is illegal, they may be punished by attachment for contempt of the superior jurisdiction. *Id.* s. 62. Salk. 148. A *certiorari*, when it requires it, removes the record itself out of the inferior court; and therefore, if it remove the record against a principal, the accessory cannot be there tried. 2 Hawk. c. 29. s. 54. 1 C. M. & R. 18. n. It may be sometimes to remove and send up the record itself, and sometimes only the tenor or copy of the record, and it must be obeyed accordingly, or it will be bad. 2 Dall. c. 195. The return of a copy of the record will not do when the *certiorari* is to remove and send up the record. *Palmer v. Forsyth*, 4 B. & C. 401. 6 D. & R. 497. Whenever the purport of the writ is not to proceed upon the record to be removed, but only to try an issue of *null tiel record*, it is sufficient to certify the tenor of the record, whatever the language of the writ may be. 3 Keb. 13. 2 Hawk. c. 27. s. 71. In general if any thing be inserted in the return by way of explanation or otherwise, which is not commanded, it will not vitiate, but be rejected as surplusage. *Inter Inhab. of Western rivers & St. Peter's, Marlborough*, Salk. 493. The return should be made by the party to whom it is directed; a return by the deputy of that party, or any other person will not do. *Ashley's case*, Salk. 479. 2 Hawk. c. 27. s. 66. The return must be under the seal of the inferior court, to whom it is directed; and if they have no proper seal, under any other seal they may think fit to employ. *Butcher's case*, Cro. Elis. 891. *R. v. Kenyon*, 9 D. & R. 694; 6 B. & C. 640. If the return be defective the court may quash it, see *R. v. Abergelle*, 8 Ad. & Ell. 394. If the writ appear to have been improperly directed or granted, it will be quashed, *quis improvidē emanavit*, upon cause being shewn to the jurisdiction from whence it was awarded. *R. v. Inhab. of Seton*, 7 T. R. 373. *R. v. Sharrow*, 2 id. 196. n. If the party who obtained the writ did so for delay, and that can be established by his admission or otherwise, the court will quash it. *Sanders v. Shiel*, 3 Dowd. 90. *R. v. Higgins*, 5 A. & E. 554, 569. The court above cannot in any way alter or amend the indictment, because they have not the concurrence of the jurors by whom it was presented; 1 Chit. C. L. 297; and therefore, however long it may appear, they cannot strike out a count from the record. *Str.* 1026. But they may make an alteration in the caption, for that is a mere history of the prior stages of the cause, and is therefore liable to be corrected. 1 Sourd. 249. n. 1. 4 East, 175. All the subsequent process, after plea to the trial, is exactly the same as if the cause had originally been commenced in the court to which the *certiorari* has removed it. 2 Hawk. c. 27. s. 83. See generally 4 Bl. Com. 320. 1 Chit. C. L. 371; 1 Burn's J. 551.

In New York, the District Attorney may remove a criminal cause by *certiorari* to the Supreme Court, as a matter of right. *People v. Vermilyea*, 7 Cowen, 141; and so in Maryland, see *State v. Judges*, 3 Har. & McH. 115; *State v. Hunt, Coxe*, 287; and Tennessee, *Kendrick v. State, Cooke*, 474; *Bob v. State*, 2 Yerger, 173. In North Carolina, *habeas corpus* and *certiorari* were issued to remove the prisoner and the record of her conviction and sentence by the county court, in the case of a slave convicted and sentenced to be executed for an offence not capital; and the sentence was reversed, and the prisoner remanded to the county court, "to receive such judgment as the laws and constitution of the State will warrant." *State v. Sue, Cam. & Nor*, 54; see *People v. McKay*, 18 Johns. 212; *People v. Goodwin*, *id.* 187; *People v. Vansantvoord*, 9 Cow. 655; *People v. Winchell*, 7 *id.* 160. This writ lies to remove the proceedings of three justices in Georgia in the trial of a party accused of inveigling a negro. *Ex parte George, Charl.* 80. In Pennsylvania, the defendant must show cause before he can obtain a *certiorari*. *Penn. v. Kirkpatrick, Addis.* 197, n. But when a removal of a criminal case is necessary for the due administration of justice, an allowance of the writ, by one of the judges of the Supreme Court, is grantable to the defendant of right. *Com. v. McGinnis*, 3 Whart. 117; and see *Com. v. Prefit*, 4 Binn. 428; *Com. v. Lyon*, 4 Dall. 302. In New Jersey, indictments found at oyer and terminer may be brought by *certiorari* before the Supreme Court sitting in banc. *State v. Gibbons*, 1 South. 40; *Nicholls v. State*, 2 *id.* 539. It lies after verdict and before judgment; *a fortiori*, it lies after an inquisition (which is not a verdict) in the case of rioters in Virginia. *Mackabay v. Com.* 2 Virg. Cas. 268. A *certiorari* in a criminal case may be allowed by a single judge at chambers. *State v. Morris Canal, &c.* 1 Green, 192; *Anon.* 4 Halst. 2. The court to which the writ is directed has no authority to decline returning an indictment. *State v. Hunt, Coxe*, 287. If a writ of *certiorari* to remove an indictment in the quarter sessions, be directed to the judges of the Common Pleas and be returned by them, the mistake is fatal. *Com. v. Franklin*, 4 Dall. 316. The return to the writ must be signed by the justice of the Supreme Court who held the session of oyer and terminer, and must contain the record of the whole proceedings against the defendant, and not merely the original indictment and papers. *State v. Gibbons*, 1 South. 40. A *certiorari* to return diminution need not be allowed by a judge. It should regularly be directed to the court below; and a rule to return should be made on that court, and will not be made on their clerk. *Lambert v. People*, 7 Cow. 103. The record is not sent up with the writ, but a transcript only. 2 South. 542; *id.* 746. A rule will be granted to take back the record and return, for the purpose of having the caption to the indictment amended so as to conform it to the fact. *State v. Jones*, 4 Halst. 2. The proceedings in an information filed, under the Massachusetts statute, for the purpose of causing a convict in the State prison to be sentenced to additional punishment, cannot be removed by *certiorari*. *Ex parte Cooke*, 15 Pick. 234. Doubts concerning the admission or legal effect of testimony cannot be brought before the court by *certiorari* or writ of error. *Ex parte Vermilyea*, 6 Cow. 555. But a challenge for principal cause is a part of the record, and this may be reviewed on *certiorari*, in a criminal case, and on writ of error in a civil case. *Aliter*, of a challenge to the favor. *Id.* A *certiorari* to remove an indictment, directed to the Court of Oyer and Terminer, will not be quashed because the indictment was in the Court of Sessions, when the writ was allowed, if it were in the former court when the writ was served. *People v. Jewett*, 3 Wend. 314.

CHAPTER XXVIII.

TOUCHING THE ARRAIGNMENT OF OFFENDERS IN CAPITAL OFFENSES.

IN the former chapter I have shewed how the prisoner is to be accused, namely, by indictment, and how to be brought in by process to his answer, and how to be dealt with, if he make default, or stand out against the process of law.

I am now to consider how he is to be proceeded against, if he be taken, or render himself, and appear in court.

For in case of an indictment of treason or felony no offender can appear by attorney, but in person, tho in some cases of other indictments after plea pleaded, the defendant may appear by attorney. 9 E. 4. 4. a. 22 Assiz. 73. B. Attorney 63.

When the offender in treason or felony comes into court, or is brought in by process, sometimes of *capias*, and sometimes of *habeas corpus* directed to the gaoler of another prison, the first thing that follows thereupon, is his arraignment.

And herein I will consider, 1. What the arraignment of a prisoner or malefactor is. 2. How it is performed, and in what manner. 3. When it is to be done.

I. Arraignment therefore is nothing else but the calling of the offender to the bar of the court to answer the matter charged upon him by indictment or appeal.

And the word in *Latin* is no other than *ad rationem ponere*, and in *French* *ad reson*, or abbreviated *a resn*, for as the *vox forensis* *disrain* or *derayn* used antiently in our books *de ceo tend suit & derayne* imports in *Latin* *disrationare* to disprove or evince the contrary of any thing, that is or may be [217] affirmed, see *Spelman's Gloss.* tit. *Dirationare*, and *Selden's* notes upon *Fortescue*, cap. 21. p. 23. so *arraigne* is *ad rationem ponere* to call to account or answer.

And this appears to be the true sense and etymology of the word, by the excellent record of the reversal in parliament of the judgment given against the *Mortimers*, E. 2. the reversal and whole record is entered *verbatim* *Patents* 1 E. 3. part 2. m. 3. where there are three errors assigned in that arbitrary judgment, and all ruled in parliament to be errors, and the attainder reversed. 1. Quòd cum aliquis de regno regis tempore pacis deliquerit erga dominum regem vel alium, per quod debeat vitam vel membrum perdere, & super hoc coram iudicibus in iudicium ductus fuerit, primò debeat poni rationi &

super delicto sibi imposito responsiones ipsius audiri, prius quam procedatur ad iudicium de eo; sed in recordis & processibus prædictis continetur, quod prædicti *Rogerus & Rogerus* coram justic' ducti adjudicati fuerunt iudicio tractus & suspendii, & postea perpetuæ prisonæ adjudicati & mancipati absque hoc, quod ipsi fuissent inde arrenati, seu quod ipsi ad aliqua eis imposita respondere possint, quod est contra legem & consuetudinem regni, &c. per quod ad iudicium de eis erroneè processum est.

2. Dicit etiam quod in recordis & processibus prædictis continetur, quod dominus rex recordabatur versus ipsos *Rogerus & Rogerus*, quod ipsi hostilitèr equitaverunt cum *Humfredo de Bohun* nuper com' *Heref.* & aliis inimicis domini regis contra ipsum regem & populum regni sui diversa mala & facinora perpetrando, quare iudicia prædicta super eisdem reddita fuerunt, cujusmodi recorda non est domino regi facere, nisi de inimicis suis tempore guerræ, & hoc, viz. quando idem dominus rex equitat cum vexillis explicatis, & non tempore pacis, sed eo tempore dominus rex non equitavit cum vexillis explicatis, nec fuit tempore guerræ, cancellario domini regis & justiciariis placearum de utroque banco sedentibus ad justitiam unicuique conqueri volenti & prosquenti faciend', per quod ad iudiciam de eis, ut prædictum est erroneè processum est. 3. Dicit etiam quod erratum est in hoc, quod, cum in Magna Charta de libertatibus *Angliæ* continetur, quod nullus liber homo capiatur, aut imprisonetur, aut de libero tenemento suo disseisietur, vel de libertatibus vel liberis consuetudinibus suis, aut utlegatur, aut exulet, aut aliquo modo destruat, nec [218] dominus rex super eum ibit, nec super eum mittet, nisi per legale iudicium parium suorum vel per legem terræ, sed in recordis & processibus prædictis continetur, quod prædicti *Rogerus & Rogerus* sigillatim iudicio tractus & suspendii adjudicati fuerunt, & postea perpetuæ prisonæ adjudicati & mancipati absque legali iudicio parium suorum ad hoc vocatorum, & contra legem terræ. *And thereupon judgment of reversal is given in these words,* Et quia inspectis recordis & processibus prædictis compertum est in eisdem, quod prædicti *Rogerus Mortimer & Rogerus Mortimer* coram justic' ducti iudicio tractus & suspendii adjudicati fuerunt, & postea pertetux prisonæ adjudicati & mancipati absque hoc, quod ipsi ad aliqua eis vel eorum alteri imposita possint respondere, & hoc tempore pacis, & absque hoc, quod dominus rex equitavit cum vexillis explicatis, & cancellario domini regis & justic' de utroque banco sedentibus, ut prædictum est, & absque legali iudicio parium suorum, quod est contra legem & consuetudinem regni *Angliæ* & tenorem Chartæ prædictæ, consideratum est per dominum regem nunc & ejus concilium in pleno parlamento, quod omnia

judicia prædicta ob defectus & errores prædictos & alios in recordis & processibus prædictis compertos revocentur, &c.

I have transcribed the record more at large, because there are many useful parts in it, some whereof will be useful to other purposes.

But as to the business in question, these two things are observable. 1. What arraignment is, namely, it is *ad rationem ponere*, for that which in one part of the record is *arrenatus*, is before rendered *rationi ponere*, to be put to answer; and therefore *Spelman*, who is seldom mistaken, is yet herein mistaken, both in the nature, orthography, and etymology of the word, which he saith is *arramare* or *adrhamire*, for it is nothing so. 2. Of what importance, and how essential it is, that in capital offenses the offender being in court should be arraigned or put to answer; the want whereof rendered the judgment given against the *Mortimers* erroneous, and reversed by the king and his parliament.

The arraignment of a prisoner, therefore, consists of these parts:

1. The calling the prisoner to the bar by his name, [219] commanding him to hold up his hand, which tho it may seem a trifling circumstance, yet it is of importance, for by holding up his hand *constat de personâ indictatâ* and he owns himself to be of that name. (a)
2. Reading the indictment distinctly to him in *English*, that he may understand his charge. [1]

(a) The ceremony of holding up the hand is not required in the case of a peer, nor is it of absolute necessity in the case of a common person, it being sufficient that it appears to the court who is the person indicted. See lord *Delamere's* case, *State Tr. Vol. IV. p. 211.* and lord *Mohun's* case, *State Tr. Vol. IV. p. 508.*

[1] In the case of *R. v. Pritchard*, 7 C. & P. 303, a person deaf and dumb was to be tried for a felony, the judge ordered a jury to be empannelled to try whether he was mute by the visitation of God; the jury found that he was so; they were then sworn to try whether he was able to plead, which they found in the affirmative, and the defendant by a sign pleaded not guilty; the judge then ordered the jury to be empannelled to try whether the defendant was now sane or not, and on this question directed them to say, whether the defendant had sufficient intellect to understand the course of the proceedings, to make a proper defence, to challenge the jurors, and comprehend the details of the evidence, and that if they thought he had not, they should find him of non sane mind. In Massachusetts a deaf and dumb prisoner was arraigned through a sworn interpreter, and the trial then proceeded as on a plea of not guilty. *Com. v. Hill*, 14 Mass. 207. Formerly when a prisoner stood mute on arraignment, a jury was called to inquire whether he did so from dumbness *ex visitatione Dei*, or from malice: and unless the former was the case he was sentenced as on conviction. 1 Chit. O. L. 425; *Turner's* case, 5 Ohio, 542. But now by the 7 & 8 Geo. IV. c. 28, s. 2, and the act of Congress of April 30th 1780, s. 30, where a prisoner stands mute the court may direct a plea of not guilty to be entered, and the plea so entered shall have the same effect as if the party himself had pleaded it.

3. Demanding of him whether he be guilty or not guilty; and if he pleads *not guilty*, the clerk joins issue with him *cul. prist.* and enters the prisoner's plea,[2] then he demands how he will be tried, the common answer is, *by God and the country*, and thereupon the clerk enters *po. se.* and prays to God to send him a good deliverance.[3]

But if the prisoner hath any matter to plead either in abatement, or in bar of the indictment, as *misnomer*, *auterfoits acquit*, *auterfoits convict*, a pardon, &c. then he pleads it without immediate answering to the felony: but in some cases *si trove ne soit*, then to the felony *not guilty*, *de quo postea*. And thus far what the arraignment is.

II. How to be done or performed.

On the part of the court, what is to be done is shewn before, but in relation to the prisoner and his coming to the bar.

The prisoner, tho under an indictment of the highest crime, must be brought to the bar without irons, and all manner of shackles or bonds. *Stamf. P. C. fol. 78. a. 2 Co. Inst. 316. Co. P. C. p. 34, 35. Bract. Lib. III. fol. 137. a. & alios libros ibi*, unless there be a danger of escape, and then they may be brought with irons.

But *note*, at this day they usually come with their shackles upon their legs, for fear of an escape, but stand at the bar unbound, till they receive judgment.(b)

III. When the party is to be arraigned.

In case of murder at the common law, the judges did [220] usually forbear to arraign the prisoner upon an indict-

(b) By this it appears to have been our author's opinion, that upon whatever occasion a prisoner be brought into court, he ought not to stand there in *vinculis* till after his conviction, when he comes to receive judgment, nor even at the time of his arraignment, (for that is the time our author is here discoursing of,) yet in *Loyer's case*, *Mich. 9. Geo. 1. B. R.* a difference was taken between the time of arraignment, and the time of trial; and accordingly the prisoner in that case stood at the bar in chains during his arraignment. See *State Tr. Vol. VI. p. 230, 231.*

[2] Defendants in an indictment have a right to plead severally not guilty: but a general plea of not guilty by all the defendants, is in law, a several plea. *State v. Smith, 2 Iredell, 402.*

[3] Though a prisoner persists in saying he will be tried by his king and his country, and refuses to put himself on his trial in the ordinary way, it will not invalidate a conviction. *R. v. Davis, Gow, C. N. P. 219.* And when the clerk of the court, upon the arraignment of the prisoners, did not further proceed, upon their pleading not guilty, to ask them how they would be tried, so that they did not make the usual reply, "By God and their country," it was held that, under the laws of the United States, the plea of "not guilty" put the prisoners upon the country, by a sufficient issue, without any further express words. *U. S. v. Gilbert et al. 2 Sumner's U. S. R. 20.* In Massachusetts, it is provided by statute, that it shall not be necessary to ask the defendant, when arraigned, how he will be tried. *Rev. Stat. Mass. c. 136, s. 26.* And these forms after the plea of not guilty, are abolished by the 7 & 8 Geo. IV. c. 28, s. 1.

ment till the year and day were past, whether an appeal were depending or not *per omnes justic' Angliæ*, 22 E. 4. *Coron.* 44. unless the evidence were very clear to convict him, and no appeal depending: or altho an appeal were depending, if the appellant were an infant. 21 E. 3. 23. b. *Stamf. P. C. fol.* 107. a. because of the delay.

But now by the statute of 3 H. 7. *cap.* 1. the justices shall proceed to try him upon an indictment of murder (or manslaughter) tho within the year, and if acquitted, yet he shall not be discharged, but at the discretion of the justices shall be continued in custody, or upon bail, till the year and day be past.

So that by this statute *auterfoils acquit* of principal or accessory, or *auterfoils attain* of the principal upon an indictment is no bar to an appeal, but *auterfoils acquit* upon an appeal remains a bar to an indictment for the same offence.

But *auterfoils convict* upon an indictment, and having had his clergy, is a good bar to an appeal notwithstanding this statute, *de quo infra*; and yet in favour of an appeal, if a man be indicted of murder, and plead to it, and be convict, if the wife enter an appeal for the same death against the prisoner, as long as that appeal is depending, judgment shall be respited; but if the wife be nonsuit in her appeal, then judgment shall be given upon the conviction. *Vide M. 12 & 13 Eliz. B. R. Dy.* 296. a. *Stanley's case*.

But as to other indictments, as of robbery, &c. the same remain at common law, as before this statute, yet it is the constant course, unless an appeal be depending, to arraign the prisoner upon an indictment within the year; for now by the statute of 21 H. 8. *cap.* 11. the party robbed hath as effectual restitution of his goods upon his prosecution of an [221] indictment, as upon an appeal; and so an appeal of robbery is rarely brought.

Nay, tho an appeal of robbery be brought by writ, the justices will not stay the arraignment of the prisoner upon the indictment, unless it be by bill, or that the plaintiff in an appeal by writ hath declared upon the writ, because the writ is general, and it cannot appear what the goods are till declaration; but in an appeal of death by writ the person killed is certain, 31 H. 6. 11. a. *Stamf. P. C. Lib.* II. *cap.* 36. *fol.* 107. a.

If a man be indicted and appealed before the same justices for the same murder or other felony, the party shall be arraigned upon the appeal first, and not upon the indictment, in favour of the appellant, as I have said; but if the appellant be nonsuit upon his appeal, the prisoner shall be arraigned

upon the appeal,(c) and process shall cease upon the indictment. 4 E. 4. 10. a. And it shall be entered *cesset processus* upon the indictment, 4 E. 4. 10. a. And if the prisoner plead, and be acquitted, or plead the king's pardon, and it be allowed, regularly the acquittal or pardon, and the allowance thereof shall be entered upon the appeal, tho it be safe to enter it likewise upon the indictment; and therefore if in that case, thro the mistake of the clerk, there be no entry of *cesset processus* upon the indictment, and the indictment lying thus open, there be process of outlawry made upon the indictment, and the party be outlawed, he hath no remedy but to bring a writ of error upon the outlawry, and he may assign for error his acquittal upon the appeal, and aver it to be the same felony, and upon confession of the king's attorney, it shall be reverst. 4 E. 4. 10. a.

If there be an inquisition before the coroner of murder, and returned, and likewise an indictment for the same offense by the grand inquest, it is usual to arraign the prisoner upon the indictment, but he may be arraigned upon both at the same time; but if arraigned upon the indictment only, there ought to be an entry of *cesset processus* upon the coroner's inquest as to the prisoner, who may otherwise be outlawd upon it.

If a prisoner be found guilty of murder by the coroner's inquest, and a bill of indictment of murder [222] be against him at the sessions of gaol-delivery for the same murder, it is usual to arraign him upon the coroner's inquest, and not upon the indictment, and if he be acquit upon that, then to arraign him upon the bill, and put him to his plea of *auterfoits acquit*.

But to avoid the trouble of a double arraignment and plea, I have observed this course.

1. If one indictment be of manslaughter, and the other of murder, then to arraign him of that offense, which is highest, and spare the other.

2. If both be of murder, but one is insufficient, as for the most part coroners inquests are, then to arraign him upon the good indictment, and quash the other.

3. If both presentment and indictment be of the same nature, and both (for instance) of murder, and both good, and both returned into court the same sessions, I have usually arraigned the prisoner upon both (so as they be put upon the same inquest to be tried) to avoid the trouble of the plea of *auterfoits acquit* or *attaint*, and to indorse his acquittal or attainder upon both presentments, always directing the jury

(c) At the suit of the king.

to acquit him upon both, if acquitted upon one, and *e converso*.

Now concerning the arraignment of the accessory; regularly the accessory shall not be arraigned, nor put to answer till the principal be attaint by outlawry or confession, or be convict, and attaint also by judgment upon verdict; for it is an offense dependant upon the principal; and altho the principal be convict, yet if he have his clergy, the accessory is discharged thereby, and shall not be arraigned. 2 Co. Inst. 183. *super stat. Westm' 1. cap. 14.*

But yet the principal and accessory being indicted by one or several indictments, and both appearing, may be arraigned together at the same time,^(d) and both pleading not [223] guilty, the same jury shall be charged with both, and directed to inquire of both, *viz.* first of the principal, and if they find him guilty, then to enquire of the accessory. 9 Co. Rep. 119. *a.* lord *Sanchar's* case. 2 Co. Inst. 184. *super stat. Westm' 1. cap. 14.*

But if *A.* and *B.* be indicted for murder, *A.* as giving the stroke, and *B.* as being present, aiding, and abetting, if *A.* flies, and *B.* is apprehended, *B.* may be arraigned and tried before *A.* be attainted by outlawry, tho he be principal but in the second degree, for they are both principals; and so it was done in the case of *Thady, H. 25 & 26 Car. 2.* tho in point of discretion it is good to try them both together.

If *A.* be indicted of high treason, and *B.* be indicted for receiving or comforting him, or procuring, or abetting (but not present,) here it is true they are all principals; but in as much as *B.* in case of a felony would have been but accessory, and it is possible that *A.* may be acquitted of the fact, it seems to me, that *B.* shall not be put to answer of the receipt or procurement till *A.* be outlawd, or at least jointly with *A.*,^(e) and in this case the same jury may be charged with both, and their charge shall be first to inquire whether *A.* were guilty, and if not, then to acquit both *A.* and *B.* and if *A.* be found guilty, then that they inquire of *B.* And in *Somervill's* case, 26 *Eliz.*^(f) mentiond before, the inquiry was first of the principal offender, and then of the receiver or procurer to avoid that inconvenience and *aweroust*, that might happen in case *B.* were first convict of the procurement and receipt, and yet possibly *A.* might be acquitted of the principal fact.

^(d) They may be, but not necessarily must, as was laid down for law by C. J. Pemberton in the trial of Count *Corningsmark*. See *State Tr. Vol. III. p. 465.* and Sir John *Hawle's* remarks thereon, *State Tr. Vol. IV. p. 199.*

^(e) Yet in lady *Lisle's* case, *State Tr. Vol. IV. p. 105.* it was without any foundation in law practised quite contrary. *Vide supra, Part I. p. 238. in notis.*

^(f) 1 *And. 109.*

If the principal do not plead *not guilty*, but some other plea, as in abatement, or in bar, the accessory shall not be put to plead till the plea of the principal be determind. 9 H. 7. 19. b. but if the principal plead *not guilty*, then the accessory, if present, shall be put to plead presently, and they may be tried by the same inquest, *ut supra*.

In antient time, if the principal made default, and appeard not, the accessory was not put to answer. [224] 44 E. 3. 7. b. *Coron.* 216. But of later times the accessory, if he appear, hath been arraigned and put to plead, but process against the inquest, and trial ceaseth till the principal come in or be attaind by outlawry. 9 H. 4. 2. a. 7 H. 4. 36. a. *Stamf. P. C. Lib. I. cap. 49. fol. 46. a.*

But the accessory may pray process against the principal, & *renuntiari juri pro se introducto*, and his consent makes it not error, 8 H. 5. 6. b. *Coron.* 463. and therefore, if the accessory be acquitted before the principal tried, it is agreed, that it is a good acquittal, and by the same reason, if he were convict, it is a good conviction, yet no judgment shall be given against him upon that conviction till the principal tried.

And upon this reason it is, that if *A.* be arrested or in prison for felony, and *B.* rescue him, or the gaoler suffers him voluntarily to escape, tho this be a distinct felony in *B.* the rescuer, and in the gaoler that voluntarily suffers him to escape, for which they may be presently indicted, yet they shall not be arraigned or put to answer till *A.* be convicted and attaind by judgment, or outlawd. 1 H. 7. 6. a. 1 E. 3. 16. b. 2 Co. *Instit.* 592. *super stat. de frangentibus prisonam*; for if *A.* be acquitted upon the indictment, the rescuer or gaoler shall be discharged.

But if *A.* be indicted of the felony, or not indicted, and be lawfully imprisond and break the prison, he may be indicted and arraigned for his felony in breaking the prison, before his conviction of the felony for which he was committed. 2 Co. *Instit. ubi supra*.

And yet, if after that indictment *A.* be arraigned of the principal felony, and acquitted, he may plead that acquittal of the principal felony in bar to the indictment for the breach of prison; *vide rationem supra, Part I. cap. 54. p. 611.*

If a *capias* be awarded against a felon, and he render himself and plead not guilty, and is let to bail, and then makes default, a *capias ad audiendam juratam* shall issue; and if he be brought in, he shall be brought in upon his plea, but it is said by *Scot*, that if he had rendred himself upon the *exigent*, and pleaded not guilty, and been let to bail till the trial, and then made default, whereupon an *exigent* is [225]

awarded, and the felon is brought in upon the *exigent*, he shall plead *de novo*, and consequently be arraigned *de novo*, for by the *exigent* awarded, the first issue is discontinued. 16 *Assiz.* 13.

CHAPTER XXIX.

CONCERNING THE PLEA OF THE PRISONER UPON HIS ARRAIGNMENT, AND FIRST OF HIS CONFESSION OF THE FACT CHARGED, AND APPROVING OTHERS.

WHEN the prisoner is arraigned, and demanded what he saith to the indictment, either he confesseth the indictment, or pleads to it, or stands mute, and will not answer.

The confession is either simple, or relative in order to the attainment of some other advantage.

That which I call a simple confession is, where the defendant upon hearing of his indictment without any other respect confesseth it, this is a conviction; but it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 27 *Assiz.* 40.

If it be but an extrajudicial confession, tho it be in court, as where the prisoner freely tells the fact, and demands the opinion of the court, whether it be felony, tho upon the fact thus shewn it appear to be felony, the court will not record his confession, but admit him to plead to the felony *not* [226] *guilty.* 22 *Assiz.* 71. *Stamf. P. C. Lib.* II. *cap.* 51. *fol.* 142. *b.*[1]

[1] Confessions made by the accused on his trial may be either expressed or implied. An express confession is, where a defendant pleads *guilty* and thereby directly confesses the crime with which he is charged, which is a conviction of the highest nature. 2 *Hawk. c.* 31, s. 1; 1 *Chit. C. L.* 428. An implied confession is, where a defendant in a case not capital does not directly own himself guilty, but in a manner admits it by yielding to the mercy of the crown, and desiring to submit to a small fine; which submission the court may accept, without putting him to a direct confession. 2 *Hawk. c.* 31, s. 3. In smaller offences, as assaults or the like, it may be advisable to confess the indictment, as the defendant may afterwards produce affidavits to show that the prosecutor made the first assault, which he cannot do after conviction. *R. v. Templeman, Salk.* 55. And in trifling personal injuries, the prosecutor and defendant frequently settle the charge in private, and the latter comes into court and pleads guilty to the

A confession in order to some other advantage, is either where the prisoner confesseth the felony in order to his clergy, *de quo infra*, cap. 44. or where he confesseth the offense, and appealeth others thereof, thereby to become an approver, and thereupon to obtain his pardon, if he convict them, and this lets in the whole learning touching approvers and approvment, which I shall here open in the order that Mr. *Stamford* hath gone before me.

1. Of what offenses a man may be an approver. 2. In what suits. 3. At what time. 4. Before whom. 5. In what manner. 6. How he shall be orderd before and after his appeal. 7. What process shall issue against the party appeal'd. 8. What pleas he shall have, and how tried. 9. How proceeded in. 10. What judgment shall be given for or against the appellor or appellee.

Before I come to these particulars, we are to know, that it is purely in the discretion of the court to admit the approver to appeal or not, or to give him any respite from judgment or execution upon his confession and approvment; for otherwise it would be in the power of any party arraigned for felony by becoming an approver to delay judgment, where (it may be) his appeal is but feigned, for the admission of his appeal or respite of judgment is but a matter of grace and discretion. 21 *H.* 6. 34. *b.* *Coron.* 66 & 67. *per omnes justic' utriusque banci.* *Co.-P. C.* cap. 56. p. 129.

And therefore this course of admitting of approvers hath been long disused, and the truth is, that more mischief hath come to good men by these kind of approvments by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders, gaolers for their own profits often constraining prisoners to appeal honest men, and therefore provision made against it by 1 *E.* 3. cap. 7.

And upon this reason it is, that as of later times the admission of such appeals hath been wholly disused, so in times when they were admitted, a great strictness was held upon such appeals, as will appear upon the examina- [227] tion of the ensuing particulars.

I. Therefore touching the offensés, whereof an approvment may be.

indictment; and upon proving a general release given by the former, submits to a small fine for the breach of the peace which his conduct has occasioned. 1 *Burn's J.* 867. As to the mode in which the confession is made, and the subsequent proceedings on charges of felony, see 1 *Chit. C. L.* 498.

It may be only of capital offenses, as of treason or felony, whether they be at common law, or by act of parliament.

When a prisoner is admitted to be an approver, he is sworn in court to approve, or rather to discover all felonies and treasons that he knows, and a certain time prefixt, (as three or four days) to make his appeal, and a coroner assigned to him to receive such his appeal and discovery. 12 E. 4. 10. b.

And yet the appeal is not good as an appeal, or as an approvement to compel the parties appealed to answer, but only as to such felonies or treasons that were committed by the appellee together with the appellor, and whereof the appellor stands indicted in court, and as to other treasons or felonies, [than] whereof the appellor so stands indicted, it is no legal appeal or approvement to put the appellee to answer.

And therefore if *A.* being indicted for robbing of *B.* and he appeal *C.* that he robbed *A.* himself, this is a void appeal, and the appellor shall be executed, and the appellee shall not be put to answer to it. 25 E. 3. 39. (a.)

So if he appeal *C.* as accessory to the robbery of *B.* either before or after, *C.* shall not be put to answer, for it is not the same felony charged upon *A.* but only an accessory to it. 10 E. 4. 14. a.

So if *A.* be indicted of felony, and he appeal *B.* of treason, *B.* shall not be put to answer that appeal; but *B.* being so accused, it may be a ground for the justices in point of discretion to make *B.* find sureties for his appearance at the next sessions, or in the king's bench, and in the mean time to be of good behaviour towards the king and his people, as was done when a person that had abjured for felony, made such an appeal of treason. *M.* 19 E. 2. *Coron.* 387. *vide simile* 21 E. 3. 18. a. *Coron.* 449.

II. In what suits.

[228] Approvement lies not in an appeal of felony, for the delay that may come thereby to the plaintiff. *M.* 15 E. 3. *Coron.* 113. 2 R. 3. 22. b. And therefore, if a party be indicted of felony, and the prisoner becomes an approver, if an appeal for the same felony be sued afterwards, all proceedings upon the approvement shall stay. 8 H. 5. *Coron.* 442.

But if *A.* be indicted of felony, and he becomes an approver, and appeal *B.* as a companion with him in the same felony, and *B.* comes in, it seems he may not become an approver, and appeal *C.* of the same felony, 15 E. 3. *Coron.* 113. *Stamf. P. C. Lib.* II. cap. 58. fol. 147. a. tho 11 H. 4. 93. b. *B. Coron.* 34. seems to be contrary.

(a) *N. Edit.* of the year books, fol. 82. b.

If a man be arrested and imprisoned for suspicion of felony, he cannot become an approver, because he is not indicted. *Stamf. P. C. Lib. II. cap. 55. Co. P. C. cap. 56. p. 129.* against the opinion of *Strange* and *Hankf. 6 H. 6. Coron. 231.*

III. At what time a man shall become an approver.

After a person is abjured for felony, 19 *E. 2. Coron. 387. 19 E. 3. Ibid. 443.* or be outlawd, 21 *E. 3. 17. b. Coron. 452.* or otherwise attaind, and hath his clergy, 17 *E. 3. Coron. 445.* he shall not be admitted to be an approver; nor one convict by verdict. 19 *H. 6. 47. b. Coron. 8.*

If *A.* be indicted of felony, and plead *not guilty*, and put himself upon the country, and the jury is charged with him, yet before the evidence fully heard, and the jury gone from the bar, he may be admitted to be an approver. 12 *E. 4. 10. b. 11 H. 7. 5. b. per omnes justic': vide contra 2 H. 7. 3. a., (b) 9 H. 5. Coron. 440.*

But if the whole evidence be heard, then he shall not be admitted to be an approver, 21 *E. 3. 18. Coron. 449. 2 H. 7. 3.* so that it seems much in the discretion of the court to admit him to be an approver at any time before verdict given, tho after *not guilty* pleaded. 12 *E. 4. 10. b. in B. R. [229] & 11 H. 7. 5. b. per omnes justic'*, which is of greater weight than the other books.

IV. Before whom a man may become an approver.

It may be before the justices of the king's bench, or justices of gaol-delivery, or justices in *eyre*, for they may assign a coroner to the prisoner to receive his appeal.

But it cannot be in inferior courts, as those that have *soke* and *sake*, and *infangtheft*, and *utfangtheft*. *Bract. Lib. III. cap. 35.*

But in case of a royal franchise, as a county palatine, or the royal franchise of *Ely*, where the bishop hath justices and coroners of his own making, there a felon may become an approver. 29 *E. 3. 42. a. Coron. 462.* in the case of *Ely*.

Neither can a man become an approver before justices of peace, nor *oyer* and *terminer*, for they cannot assign a coroner. 9 *H. 4. 1. Coron. 457. 4 Co. Instit. 165. 169. Co. P. C. 130.*

V. The manner of approver, and of the allowance of it:

Before any man shall be admitted to be an approver, he must confess the indictment in open court, and pray a coroner to be

(b) In this case the whole evidence had been given, and the jury gone from the bar, which was one reason assigned by the court, why they could not admit the prisoners to become approvers; so that this case no way contradicts what is before said; but there was another exception besides, on which the court laid the greatest stress, because they only prayed a coroner, but did not acknowledge the felony.

assigned him, and regularly this is to be done upon his arraignment, before plea pleaded, tho, as hath been said, his confession hath been sometimes admitted after *not guilty* pleaded. 11 *H.* 7. 5. *b.* 12 *E.* 4. 10. *b.* and therefore if he hath pleaded before *not guilty*, and then prays a coroner without confessing the felony, the inquest shall be taken, and if found guilty he shall be executed. 2 *H.* 7. 3. *a.* adjudged; and if he hath not pleaded to the country, but prays a coroner, and will say no more, he shall have *peine fort & dure*, tho the book of 1 *H.* 5. *Coron.* 441. be that he shall be hanged.

Upon confessing the felony, and praying a coroner to be assigned, the court doth these things.

1. They assign him a coroner to take his appeal. 2. They prefix him a time to make his appeal, sometimes three, sometimes four days. 8 *H.* 5. *Coron.* 439. 12 *E.* 4. 10. *b.* 26 *Assiz.* 19.
3. He shall be removed out of the strait custody, and make his appeal before the coroner, that he may not have any just pretence to say it was by duress or constraint, [230] 12 *E.* 5. *Coron.* 169. and therefore, if upon the coming back of the approver to the court, he wave his appeal, as being made by duress and against his will, the coroner shall be examined touching it upon oath; and if he affirm it was made *de bon grè*, the appeal shall stand, but the approver shall be hanged. 22 *E.* 3. *Coron.* 255. 12 *E.* 3. *Coron.* 169. 4. The coroner must put his appeal into form, and when the prisoner comes back into the court, he must repeat his appeal, and shall not be helped by the court or any by-stander, 26 *Assiz.* 19. and if he miss in repeating his appeal in any matter of moment, as the colour of the horse, &c. he shall be hanged; for if he mistake in such circumstances, which must need come from his own memory and information, it is a sign it is feigned. 5. If he make not his appeal before the coroner in the time prefixt, he shall be hanged; and if he make it, and disavow it when he comes into the court, he shall, upon the examination of the coroner upon oath, be hanged. 6. If he appeal one, who by his own confession is not in the kingdom, he shall be hanged. 2 *E.* 3. *Coron.* 153. for he cannot be attaint at his suit. 7. After his appeal made he shall have an allowance of 1*d.* *per diem* by the book of 12 *E.* 4. 10. *b.* 26 *Assiz.* 19. 8 *H.* 5. *Coron.* 439. three half-pence *per diem per Britton*, and by *Fortescue* 21 *H.* 6. 34. *b.* nothing at all, till he hath convicted the appellee.

VI. Touching process upon an appeal by an approver.

It is to be known, that altho a coroner cannot receive an original appeal but of such felonies as are committed in that county whereof he is coroner, yet if a felon become an approver,

the coroner may take an appeal of any felony, tho committed in a foreign county. 9 H. 5. *Coron.* 437.

Altho it seems, that book is not law, for he can appeal only in the county where he is indicted, and he cannot be indicted in one county of a felony committed in another county, therefore *quare librum*; it seems it must be intended where *A.* is indicted in the county of *B.* and taken in the county of *C.* and there the coroner receives his confession and appeal, which possibly he may do without any special assign- [231] ment *virtute officii*, as he may take an abjuration of a prisoner in a foreign county.

But the coroner in that case cannot make process against the appellee in a foreign county, 29 E. 3. 42. a. *Coron.* 462. but he may in the same county, *Stamf. P. C.* 146. a. b.

And therefore the bishop of *Ely* having the royal franchise of *Ely*, and justices and coroners of his own, and also having franchise of *reterna brevium* in divers hundreds in the county of *Suffolk*, and likewise a gaol there, a felon indicted and in prison at *Ely* became an approver before the coroner of the franchise of *Ely*, and appeald one in the bishop's gaol in his hundred in the county of *Suffolk*, the coroner of *Ely* cannot make process to the bishop's bailiff of his liberty in the county of *Suffolk* to bring the appellee to *Ely*, which is in another county, viz *Cambridgeshire*, adjudged 29 E. 3. 42. a. *Coron.* 462.

At common law it seems, if an approver appeal parties that are demurrant in a foreign county, there could be no process made but in the king's bench, by removing the record thither by the justices of gaol-delivery, before whom the parties became an approver.

But this is remedied by the statute of 28 E. 1. *de appellatis*, whereby power is given to justices of gaol-delivery to issue process to the sheriffs of foreign counties to take the appellees, and bring them before the justices in that county where the appellor is indicted.

If the appellor allege the place, whereof the appellees are, (as he must,) and thereupon process issues to the sheriff of that county, and he return there are no such persons in his bailiwick, 25 E. 3. 42. b. or *non sunt inventi*, 21 H. 6. 34. b. the approver shall have judgment and be executed, and he shall not be received to say they are in another county, and pray process thither. 22 E. 3. *Coron.* 460. for if he be once found false in what he saith, he shall not be credited in any thing, but his appeal shall be presumed untrue; vide 21 H. 6. 34. b. *Coron.* 456.

If the approver die before his appeal determind, or be executed for the felony, 21 E. 3. 18. a. 21 E. 3. [232]

17. *b. Coron.* 452. or hath the advantage of his clergy, 3. *E.* 3. *Coron.* 369. or disavows his appeal, and will not prosecute it, 21 *H.* 6. 34. *b.* 3 *H.* 6. 50. *b.* yet process shall be continued against the appellee at the king's suit, and the appellee, if he come in, shall be arraigned, for the appeal was well commenced, and it stands as an indictment, by reason of the great presumption that a man that confesseth himself guilty, would not charge another falsely to be companion with him in the same felony.

But if the appeal were never well commenced, as if the appellor were convicted by verdict or outlawry, *de quibus infra*, or if the king pardons the approver after the approval made, and before trial, 47 *E.* 3. 16. *a. Stamf. P. C. fol.* 149. *a.* the appellee shall be discharged without arraignment at the king's suit, or further process upon the appeal; for now the approver having his pardon is sure to escape, and therefore shall not be trusted in his prosecution against another for the same felony. But of these matters farther under the next head.

If the appellee be returned *non inventus*, the appellor, as hath been said, may be executed, but process of outlawry shall issue against the appellee, as it seems not by one *capias* and *exigent*, but by *capias*, *alias*, *pluries* and *exigent*; *quare*.

VII. Touching proceedings upon the appeal after appearance of the appellee.

He that is appeal'd shall not be let to bail but in three cases: 1. If the approver be dead. 2. If the person appeal'd be of good fame. 3. If the appellor wave his appeal. *Westm.* 1. *cap.* 15. (*a*) *Stamf. P. C. Lib.* II. *cap.* 18. *Fol.* 74. *a. b.*

And therefore, if *A.* be severally appeal'd by two approvers, *B.* and *C.* indicted severally of several felonies, and *A.* join battle, and vanquish *B.* yet he shall not be let to bail till the appeal of *C.* be determin'd. 25 *E.* 3. 42. *b.*

When the appellee comes in he may take his legal [233] exceptions to the insufficiency of the appeal, as that the appellor is not in prison but at large, 21 *E.* 3. 18. *a. Coron.* 448. 6 *H.* 6. *Coron.* 231. or that the appellor is within age, or above seventy years old, or a woman, or maimed, whereby the appellee loseth his trial by battle. *Stamf. P. C. cap.* 58. *fol.* 147. *b.* or that he is a clerk convict, and hath not made his purgation. 17 *E.* 3. 13. *a.* or that he is abjured the realm. 19 *E.* 2. *Coron.* 387. or that he was convict by

verdict before he appealed of the same offense: *Vide Co. P. C. cap. 56.*

Also he may have all those exceptions, which an appellee at the suit of a lawful person either by writ or bill may have, as that the plaintiff is outlawd for another felony, or in a personal action, but if he hath obtained his pardon, the appellee shall be put to answer, as in another appeal. 21 E. 3. 17. b. but if the approver be pardoned *that* felony, upon which he makes his appeal, the appellee shall not be put to answer neither at the party's suit, nor at the suit of the king. 47 E. 3. 16. a. *ubi supra.*

If the appellee hath no exceptions to the appeal, or to the disability of the appellor, but pleads to the felony, he may put himself upon trial, either by battle, or by the country.

Touching the form of the trial by battle, I shall make no long narrative at this time, because it is an unusual trial at this day, and besides, it will come more aptly in another place.

If when battle is joined they come to the combat, and the appellee be vanquished, it is an attainder of the appellee, and the appellor shall have the benefit of the king's grace and a pardon *tantum ex merito justitie.*

But if the approver appeals several persons, and they severally join battle, the appellor shall not have his pardon till he vanquish them all successively, for if he be vanquished by the last, or disavow his appeal against the last, he shall be executed. 41 E. 3. *Coron.* 98. 21 H. 6. 34. b. *Coron.* 456.

And *note*, that, if in the field when they come to battle, the appellor disavow his appeal, the approver shall be executed, and the appellee deliverd without being arraigned at the king's suit, for his disavowing in the field is *quasi* a trial in fact. 21 H. 6. 34. b. *Coron.* 456. *Stamf.* [234] *P. C.* 148. a. b.

But if before the deraigning of battle the approver disavow his appeal, the approver shall be hanged, but the appellee shall be put to answer at the king's suit, for it may be the king hath other evidence besides the approver to convict him.

If *A.* becomes approver, and appeals *B. C.* and *D.* of the same felony, and in his combat with *B.* becomes recreant, *B.* shall be discharged, but the appeal shall stand against *C.* and *D.* 41 E. 3. *Coron.* 98.

If three be indicted for the same felony, and they become approvers, and the appellee joins battle with them all, he shall perform it severally; but if he vanquish one of the appellants, he is thereby acquitted against all the rest, and the approvers shall be executed, and the appellee deliverd. 7 E. 3. 12. a.

But if the appeal be of several felonies, tho he vanquish one

appellant, he must fight successively with the rest. 19 H. 6. 35. a. 47 E. 3. 5. a. for the charges are several by the several appellants.

If the appellee puts himself upon trial *per patriam*, the approver shall be sworn as well to the petit jury upon the trial when he gives his evidence, as well as make a general oath at the time of his first becoming approver, and hence he is called *probator*, (*quod tamen quære*, because he is a person convict,) so that altho he were a partner in the offense, and tho he stand indicted of it, and tho he be convicted by his confession, yet he is admitted a witness upon his own accusation or appeal, and the reason is, because he accuseth himself by his confession, as well as he doth the appellee by his appeal, and therefore gains a probable credibility of his testimony.

And, therefore P. 19 Jac. in the star-chamber, *Noye's Rep.* p. 154. in Sir *Percy Cresby's* case, one defendant, that accuseth not himself, is not admitted as a witness to convict his companion, but if he accuse himself, he is a witness against his companion.

But this testimony or evidence is not conclusive to [235] the jury, for the jury may consider as well the credibility or not credibility of the witness, as the matter he swears.

And altho it seems it is now no plea for the appellee to say, he is *boni nominis & famæ, & in franco plegio & in assid domini regis, & habet dominum, qui ipsum advocet*, as it was in *Bracton's* time, it is good evidence for the prisoner, if there be no other evidence against him but the testimony of the approver; and therefore, if the appellor die, yet the king may proceed with the appeal, because tho he cannot have the testimony of the approver himself, yet there may be other evidence of the fact.

But yet, when the approver is dead after his appeal, and before trial, the party isailable, because much of the evidence, which may conduce to the conviction, namely the oath of the approver, is lost, and so less probability of his conviction.

If the approver be vanquished and kild upon the place in the battle, or if the appellee be acquitted by verdict, yet a judgment must be entred upon his confession; for his bare confession of the felony is a conviction, it is true, but not an attainder till judgment given, *quodd suspendatur per collum*, which is not presently entred upon his becoming approver, but when either by trial, or for any other cause before shewn, the court thinks not fit to spare his execution.

And on the other side, if the appellee be convict by verdict or battle, or slain upon the field, yet judgment must be given, *quodd suspendatur per collum*. 8 E. 3. Judgement 225. And

in that case, altho the life of the approver is saved, yet he shall be banished, unless he obtain the king's pardon. *Stamf. P. C. Lib. II. cap. 52.* lord *Coke P. C. cap. 56.* saith he shall have a pardon *ex debito justitiæ*. And thus far concerning approvers.

I should now consider the business of abjuration, which is always accompanied with a confession of the felony before the coroner, but because *that* was a kind of appendant to sanctuary, which is wholly and finally taken away by the statute of 21 *Jac. cap. 28.* I shall not incumber myself with that business. [2]

CHAPTER XXX.

[236]

CONCERNING THE PLEAS OF THE PRISONER UPON HIS ARRAIGNMENT, AND FIRST, CONCERNING PLEAS IN ABATEMENT OF THE INDICTMENT.

THE prisoner upon his arraignment either confesseth, or pleads, or stands mute; the first of these is dispatched in the former chapter, the second matter comes now to be considered, *viz.* his pleas upon his arraignment.

Pleas upon the arraignment are of four sorts.

1. Pleas that are declinatory of his trial, and such were anciently the plea of privilege of sanctuary, and the plea of clergy; the former is taken away by the statute of 21 *Jac. cap. 28.* the latter stands still in force; but because for the most part that benefit is claimed after conviction, and rarely before, I shall refer the whole business of clergy to a distinct examination, after I have done with the conviction of the prisoner.

2. Pleas in abatement of the indictment.

3. Pleas in bar of the indictment.

4. Pleas to the matter of the indictment, *viz. Not guilty.*

Now as to pleas in abatement of the indictment, they are of these kinds.

I. Such defects as arise upon the indictment itself, and the insufficiency of it, which hath been at large considered in the 24th chapter; if any such exception be taken by the prisoner, he may pray counsel to be assigned to him to manage his exceptions and take more; but he shall not have a copy of the

indictment(a) from the court, but he and the counsel assigned may have *oyer* of the indictment, and press their exceptions upon it.

But it is rare to take any exceptions to indictments [237] before conviction, unless upon indictments removed into the king's bench by *certiorari*, which the court may in discretion hear or not hear, but remand the prisoner and the indictment.

And the reasons, why they are not taken in the country before conviction are, 1. Because he may have the same advantage of the exceptions after the trial and before judgment, as before trial.(*) And 2. Because if the exceptions appear material, the court can quash that indictment, and direct a new bill to be sent out to the grand jury, wherein these faults may be amended, and the prisoner arraigned *de novo*.

II. Such defects as are in matters of fact, as *misnosmer*, or false addition of the prisoner.

As to the plea of *misnosmer*: In appeals or actions between party and party, or in indictments, if the defendant plead *misnosmer*, he must be careful that he conclude not himself by the manner of his pleading.

Therefore, when *Alan Gerard* was committed upon a *capias* in felony, the pleading was & *statim ductus ad barram in propria persona, & quæsitus quomodo se velit inde acquietare statim dicit, quod ipse habet nomen Johannis Allen, & non Alani Gerard*, and pleads over to the felony *not guilty*, and the king's attorney replied, that *tempore indictmenti prædicti fuit & adhuc est cognitus tam per nomen Alani Gerard, quàm per nomen Johannis Allen, & quòd culpabilis est de felon' &c. Et hoc petit quod inquiretur per patriam, &c. ideo venit inde jurata, & prædictus Alanus Gerard per nomen Johannis Allen traditur in ballium: Vide 6. H. 7. 7. a.*

In an appeal or other action at the suit of the party *misnosmer* is a good plea.

If the defendant in an appeal or indictment plead [238] *misnosmer* of his surname, the plaintiff or king may aver, *que conus per un nosme & l'autre. 1 H. 7. 29. a.*

(a) But now by 7 W. 3. cap. 3. in all cases of treason, which works corruption of blood, or of misprision of such treason, the prisoner shall have a copy of the indictment.

(*) But now by 7 W. cap. 3. no indictment for high treason, whereby any corruption of blood may be made, or for misprision of such treason, nor any process or return thereupon shall be quashed for mis-writing, mis-spelling, false or improper *Latin*, unless exception be taken in court before any evidence given upon such indictment, nor shall any such mis-writing, &c. be any cause to arrest judgment after conviction, but such judgment may nevertheless be reversed upon writ of error, as if this act had never been made.

But in an appeal or action at the suit of the party, if *misnosmer* be pleaded of the christian name, the plaintiff must take issue, and cannot plead *conus per l'un nosme & l'autre*. 1 H. 7. 29. a. 21 E. 3. 47. b.

In an indictment of felony if the prisoner plead *misnosmer* of his christian name, some books hold it a good plea. 11 H. 4. 41. b. *Misnosmer* 18. *Stamf. P. C. Lib.* 3. cap. 18. fol. 181. b. but other books of greater and later authority be to the contrary. 1 H. 5. 5. b. *Misnosmer* 9. *Coron.* 274. 3 H. 6. 26. a. (b) *B. Misnosmer* 6 per Rolf.

It seems by the case of *Gerard* before cited, which was a record of a plea in the time of E. 4. tho the defendant may plead *misnosmer* of his christian name, yet the king may aver *conus per l'un nosme & l'autre*, tho it be otherwise in an appeal, but in all cases of pleading *misnosmer*, he must plead over to the felony: *Vide Dy.* 88. a. b. 21 E. 4. 71. a. b.

But, as hath been before said, there is little advantage comes by these pleas to the prisoner upon these reasons; 1. Because, if this exception be taken in the country at the gaol-delivery, the court may allow the exception, and direct a new bill according to what the prisoner says his true name or addition is, for, as hath been said, whosoever pleads *misnosmer* or a false addition must give himself the true name and true addition by his plea, and *that* will be conclusive to him.

2. Because this plea of *misnosmer* or untrue addition shall be always tried by the same inquest, that is to pass upon the prisoner, and is ready at the bar, and at common law should never be sent to be tried in a foreign county. 34 H. 6. 50. a. 1 E. 4. 3. a. tho the book of 5 E. 4. 2. a. as to the addition of place be contrary.

But however in all cases of indictments of felony, tho the plea in itself were a foreign plea, and triable in [239] another county, yet by the statute of 22 H. 8. cap. 14.

(continued by 28 H. 8. cap. 1. made perpetual by the statute of 32 H. 8. cap. 3.) all foreign pleas shall be tried by a jury of the same county where the party is indicted, but *that* statute extends not to treason, nor to an appeal of felony, but 32 H. 8. cap. 2. extends to appeals of felony, but not to an indictment of treason, so that foreign pleas in case of indictments of treason stand as they did at common law. *Co. P. C. p.* 27.

And *note*, that regularly in all pleas, whether to the writ, or

(b) The case in 1 H. 5. 5. b. was a *misnomer* of the surname, and in the abridgement of that case, by Fitzh. *Coron.* 274. there is a *quære* added, *quære si soit en meisme de baptisme*, and in 3 H. 6. 26. a. it was not the point of the case, but only said *obiter arguendo*; and *Gerard's* case is to the contrary. See also *Layr's* case, *State Tr.* Vol. VI. p. 237.

in bar by matter of record, or by matter of fact, or both, if the plea do not confess the felony, as the plea of a pardon in case of an indictment, or a release in case of an appeal, tho his plea be found against him by issue tried, or adjudged against him by the court, yet he shall not be convicted thereupon, but plead over to the felony *not guilty*, as well upon an indictment, as upon an appeal, and this *in favorem vitæ*, 22 E. 4. 39. *pur cur*?. 9 H. 4. 1. b.

III. A third sort of pleas in abatement by matter *dehors* is matter of record.

If *A.* be indicted of the murder of *B.* and there is another indictment afterwards taken of the same death against the same person, and he is arraigned upon the second indictment, because it is the king's suit the second shall not abate; yet usually the justices quash the other by judgment.

Yet *nota* the common course to prefer a new indictment of murder to the grand jury, altho an inquisition of murder be returned by the coroner, and if the coroner's inquisition be insufficient indeed, it shall be quashed, but if sufficient, it is usual to arraign the prisoner upon both indictments, and an acquittal upon one shall be upon both; and this is done, because otherwise the coroner's inquest will stand as a charge on record against the prisoner, tho acquitted upon the indictment, and process of outlawry will issue thereupon.

So it is the constant use at this day to prefer two indictments upon the same killing against the same person, one of [240] murder, and the other of manslaughter upon the statute of 1 Jac. for stabbing, and the prisoner arraigned upon both pleads to both, and the jury charged with both, *viz.* that if they find him guilty of both indictments, to return it so, if not guilty of murder, yet to inquire whether guilty upon the other indictment.

If a duke, or an earl, or baron be indicted by a common name of *J. S. miles*, or *J. S. armiger*, he may plead the *misnomer* to the indictment, *viz.* that he is a duke, or an earl, or baron, or peer of the realm, *nient nosme*, &c. because that title is part of his name, and intitles him to be tried by his peers; but then he must shew forth a writ testifying it upon his plea pleaded, because it is but dilatory, and shall not be tried by the country, but by the record a 35 H. 6. 46. *a. per Fortescue*. 6 Co. Rep. 53. *a.* countess of Rutland's case, *Per curiam*.

And thus far touching dilatory pleas.[1]

[1] If the indictment assign to the defendant no christian name, or a wrong one, no surname, or a wrong one, no addition, or a wrong one, his only mode of objection to such matter is by plea in abatement. 2 Hawk. c. 25. s. 70; 2 Leach,

478; *Com. v. Dedham*, 16 *Mass.* 146; *Turns v. Com.* 6 *Metz.* 225. By the 4 *Annæ* c. 16. s. 11. it is provided that no dilatory plea shall be received in any court of record, unless the party offering such plea do by affidavit prove the truth thereof, or show some probable matter to the court to induce them to believe that the fact of such dilatory plea is true. This provision applies to pleas in abatement in criminal proceedings. *R. v. Grainger, Burr.* 1617; *Com. v. Sayers*, 8 *Leigh*, 722. This affidavit may be made by the defendant or a third person. *Lumley v. Foster, Barnes*, 344. It should state that the plea is true in substance and fact, and not merely that the plea is a true plea. *Onslow v. Booth, Str.* 705. Any misnomer, in general, is ground for abatement; as where the indictment charged the defendant as George Lyons, it was held, he could well abate it by showing his true name was George Lymes. *Lymes v. State*, 3 *Porter*, 236. So, want of addition. *State v. Hughes*, 2 *Har. & McHen.* 479. And a wrong addition may be taken advantage of in the same manner. Thus, in an indictment on the statute of Maine, prohibiting the sale of lottery tickets, giving the accused the name of lottery vendor, when his proper addition was broker, furnishes good ground for abating the indictment. *State v. Bishop*, 15 *Maine*, 122. If the plea of misnomer or want of addition be true, the prosecutor may, instead of replying, if the grand jury be still sitting, alter the indictment by substituting the name, &c. by which the defendant so pleaded, for the name in the indictment, and have it again preferred and found, and the defendant again arraigned upon it, in which case he will be estopped from again pleading a misnomer or want of addition. But now by the 7 *Geo. IV.* c. 64. s. 19. for preventing abuses from dilatory pleas, it is enacted, that no indictment or information shall be abated by reason of any dilatory plea of misnomer, or want of addition, or of wrong addition of the party offering such plea, if the court shall be satisfied by affidavit or otherwise of the truth of such plea; but in such case the court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded. The court will not allow a plea in abatement to be amended. 1 *Burn's J.* 3. If the plea be insufficient in form, or bad in substance, the prosecutor may demur. *R. v. Gibson*, 8 *East*, 83. Great exactness is required in these pleas. *O'Connell v. Reg.* 11 *Cl. & Fin.* 155; 9 *Jurist*, 25. The court will not, on motion, quash a bad plea in abatement. There is a great difference between quashing indictments and quashing pleas; it would in general, be going too far to quash the latter, though it were clearly defective. *R. v. Cooke*, 2 *B. & C.* 618; 1 *D. & R.* 43. *S. C.* In cases of felony the demurrer and joinder may be *ore tenus*. *Fest.* 105; 1 *Leach*, 476. In indictments for treason, the defendant must join in demurrer instant. 6 *St. Tr.* 241. Two pleas in abatement, it is said, may be pleaded at the same time. *Com. v. Long*, 2 *Virg. Cas.* 318. If the plea be untrue in fact, the prosecutor may reply denying such fact, or allege matter of estoppel. Thus to a plea of misnomer, he may either deny the plea, or reply that the defendant is known as well by one name as the other. 2 *Leach*, 476. It is not a good replication that the defendant is the same person mentioned in the indictment. *Com. v. Dockham, Thatch.* C. C. 238.

The usual proof in support of a plea in abatement of misnomer, is an examined copy of the register of the defendant's baptism, with evidence of identity by a party present at the ceremony or otherwise. 1 *Burn*, 4. Where the defendant alleges that he was named and called J. S., it is enough for him to prove that he was generally known by that name. But it is not sufficient in such case to prove that he has been called so once or twice. *Maester v. Harts*, 3 *M. & S.* 453.

Before the 7 *Geo. IV.* above referred to, the judgment for the defendant on these pleas was, in case of a misdemeanor, that the indictment be quashed, and that he be not compelled to answer, but should depart the court without day: *R. v. Shakespeare*, 10 *East*, 87; but for felony or treason, though the indictment were quashed, the court would not dismiss the defendant, but would cause him to be indicted again. *Sir H. Ferrer's case*, *Cro. Car.* 371; 2 *Hawk. c.* 34. s. 2. But the statute allows the court to cause the indictment to be amended on such plea, and to call on the party to plead as if no dilatory plea had been pleaded. The

judgment for the crown on a plea in abatement to an indictment for a misdemeanor is final, 2 Hawk. c. 31. s. 7; 8 East, 107; but in treason or felony the judgment is that the defendant do answer over. *Id.* And in both cases, on a judgment on demurrer, the judgment is that the defendant do answer over; *Tremaine's P. C.* 189; *R. v. Johnson*, 6 East, 583; *Eichorn v. Le Maître*, 2 Wils. 368; and the reason for this latter doctrine is, that every man shall not be presumed to know matter of law, which he leaves to the judgment of the court, but he is presumed to know whether his plea be true or false in matter of fact. See generally, 2 Hawk. c. 34; *Bac. Abr. Abatement*; *Com. Dig. Abatement*; *Arch. C. P. edit.* 1848. p. 99; 1 *Burn's Just.* 1 *Whart. C. L.* 135.

CHAPTER XXXI.

CONCERNING PLEAS IN BAR OF AN INDICTMENT OF FELONY OR TREASON, AND FIRST, OF AUTERFOITS ACQUIT.

PLEAS in bar of the indictment of felony or treason are of two kinds, *viz.* 1. Such as are purely matters of record, or 2. Such as are mixt, partly consisting of matters of record, partly of matters of fact.

Of the former sort are the pleas of pardons, either general by act of parliament, or special by the king's charter.

But because the business of pardons is not only a large title and full of variety, but is also applicable to all offenses [241.] criminal, whether the party be indicted or not indicted, or whether convicted, or attainted, outlawd, or put in *exigent*, I shall reserve the discussion of pardons towards the end of this book.

Of the latter sort are many pleas consisting of matters of record and also matters of fact. And they are of these sorts principally,

1. *Auterfoits acquit* of the same felony.
2. *Auterfoits attaint* or *convict* of the same felony.
3. *Auterfoits attaint* of another felony.
4. *Auterfoits convict* of another felony and had his clergy.

Now as to the plea of *auterfoits acquit*, (as also *auterfoits attaint de mesme felony ou treason*,) it consists of two kinds of matters. 1. Matter of record, namely, the former indictment and acquittal, and before what justices, and in what manner, *viz.* by verdict or otherwise; and 2. Matter of fact, namely, that the prisoner is the same person that was acquitted, that the fact is the same of which he was acquitted, and whereof he is now indicted. This plea, tho the prisoner ministreth rudely, yet counsel shall be assigned to him to put his plea in due form, because it is a special plea.

Mr. *Stamford* tells us, that the prisoner need not have the record of his acquittal in *poigne*, because the plea is not dilatory, but in bar, (and so in the other case of *auterfoits attaint*, as it seems,) according to the difference taken by *Frowick*, 21 *H. 7. 9. a.*

But if that should be law, it were in the power of every prisoner to delay his trial as he pleaseth, by pleading *auterfoits acquit* or *attaint* in another court, and so to put the king to reply *nul tiel record*, and then day given over to the next gaol-delivery to have the record, and to remove it by *certiorari* into the king's bench, if the trial be there, or the tenor of it by *certiorari* into chancery, and by *mittimus* into the court where the trial is.

For regularly, if a record be pleaded in bar, or declared upon in the same court, the other party shall not plead *nul tiel record*; but have *oyer* of the record; but if it be in [242] another court, he shall plead *nul tiel record*, and a day given to procure the certificate of the record, or the tenor thereof. 5 *H. 7. 24. a. b.*

But it seems, that for the avoiding of false pleas and surmises and to bring offenders to speedy trial in capital causes the prisoner must shew the record of his acquittal, or vouch it in the same court one of these ways.

1. By removing the tenor of the record of his acquittal into chancery by *certiorari*, and having it in *poigne*, or sent to the justices by *mittimus sub pede sigilli* and thus the prisoner pleading *auterfoits acquit* shewed the record of his acquittal *sub pede sigilli*. 2 *E. 3. 26 b. Coron. 150.*

2. Or else if he be arraigned in the king's bench upon an indictment removed, or found before them, and were formerly acquitted of the same felony, either before justices of peace or gaol-delivery, the court will give him a writ of *certiorari* to remove the record before them, and respite his plea till he can remove his acquittal into the court, that so he may form his plea upon it, for the record is part of his plea, and thus it was done. 20 *E. 2. Coron. 232.* and thereupon his plea is put into form setting out the record in certain, *Et hoc vocat recordum acquietancie prædictæ coram ipso rege hic ad mandatum domini regis missum & coram ipso rege remanens*; and thus it is pleaded in 2 *E. 4.* in *Hodson's* case, who was arraigned in the king's bench for murder, and pleaded an acquittal before the justices of peace in *Lincolnshire*.

But it is to be observed, that the record must be removed by writ; for altho the king's bench may take an indictment or other record of the justices of peace *propriis manibus*, where it is to be proceeded on for the king, yet they cannot take a record of

an acquittal to serve the prisoner's plea, without writ. 8 *E.* 4. 18. *b.* 3 *E.* 3. *B. Coron.* 218.

If a man pleads *auterfoits acquit de mesme felonie*, and vouch the record; the court may examine proof, that it is the same felony, and thereupon allow it without any solemn confession by the king's attorney, 26 *Assiz.* 15. But the safest way is the confession of the king's attorney, or an [243] inquest charged to inquire, whether it be the same fact, *Vide R. Entries* 385. *a.* his plea allowed by the testimony of the justices of peace before whom he was acquit, *ideo consideratum est quodd prædictus B. de felonid prædicta sit quietus & eat inde sine die.*

3. If the prisoner be indicted and arraigned in the country before justices of gaol-delivery, &c. and the prisoner pleads *auterfoits acquit* of the same felony before the same justices in that county, or other justices of the same county, that were before them, then he concludes his plea, *Et hoc vocat recordum acquietanciam, prædictæ coram præfatis justiciariis* at such a gaol-delivery; and if it be in the king's bench, he mentions the term and roll, and thus is the plea in 13 *E.* 4. *Clud's* case in the king's bench.

So that the prisoner, tho he doth not shew the record *sub pede sigilli*, yet he must plead it certain, and have the record in court and remove it thither, if it be not in the same court, and not expect till *nul tiel record* be pleaded, for it is part of the prisoner's plea, tho the court may favour him with time to procure the removal of the record.

Now the matter of fact of his plea consists in his averment, that he is the same person, and that the felony, whereof he was acquitted, is the same whereof he is indicted, which is issuable, and the king's attorney may take issue upon it, or confess it if it be true, and then thereupon judgment shall be entered, *quodd eat sine die*, or the court may examine proofs and allow it. 26 *Assiz.* 15.

But it is to be known, that there must not only be an acquittal by verdict, but a judgment thereupon, *quodd eat sine die*, for the bare verdict of his former acquittal is not a sufficient bar without a judgment pleaded also, tho the acquittal regularly is a warrant for entry of the judgment at any time after.

And *note* also, that a formal acquittal by judgment is not only a bar of a new indictment for the same offense, but if the party be outlawd upon that new indictment, he may assign his former acquittal for error in that outlawry, and reverse it for that cause, and in that case the judgment is not only for the reversal of the outlawry, but also farther, *quodd*

ipse tam de indictamento de morte & murthero prædict' &c. quàm de utlegariâ prædictâ eat sine die, and such is the judgment in *Clud's* case, 14 E. 4. where that error is assigned to reverse the outlawry.

Now for the full declaration of this plea these things are considerable. 1. What shall be said the same felony whereof the party was acquitted. 2. What manner of acquittal there must be to make it a bar. 3. In what suits *auterfoits acquit* is a plea.

I. As to the first of these.

If *A.* and *B.* be indicted as principals in robbing or killing of *D.* and *B.* be convict as principal, and *A.* be acquitted, if after this *A.* be indicted, as accessary after the fact, this formal acquittal as principal, is no bar, for it is another offense, [1] 27 Assiz. 10 Coron. 200. 8 H. 5. 6. b. Coron. 463. Stamf. P. C. fol. 105. a.

But if *A.* be indicted as accessary before the fact, he may (as it is held,) plead *auterfoits acquit* as principal, because it is in effect the same offense. 2 E. 3. 26. b. Coron. 150. 282. but antiently the law was otherwise. 8 E. 2. Coron. 424. *Itinere Kant'.*

If *A.* be indicted in the county of *B.* for the murder of *C.* and it be supposed that the murder was committed. 1 *Murtii* 17 Car. and he be acquitted, and after indicted again in the same county, supposing the murder 21 Car. yet notwithstanding that variance he may plead *auterfoits acquit*, and aver it to be the same felony, for the day is not material, and besides the death is of a person certain, who can be but once killed. 3 Assiz. 15. 25 E. 3. Caron. 136. 22 Assiz. 55.

And the same law seems to be in an indictment of robbery, tho it is possible several robberies may be committed at several days, for still it lies in averment, that it is the same notwithstanding the variance.

If a man be indicted for the robbery or murder of *John a Stiles* and acquitted, and after indicted for the robbery or murder of *John a Nokes*, yet he may plead *auterfoits acquit*, and aver it to be the same person notwithstanding the variance in the surname, for a man may have [245] divers surnames, and he may aver, *que unus per l'un nosme & l'autre.* 26 Assiz. 15 Coron. 189. 11 H. 4. 41. a.

If *A.* be indicted in the county of *B.* for a robbery or other felony supposed to be done at *D.* in the county of *B.* and be acquitted, and be afterwards indicted for a robbery upon the same person in the county of *B.* but at another vill, yet he shall

[1] 2 Hawk. c. 35, s. 11; Foot. 361; R. v. Plant, 7 C. & P. 575.

plead *auterfoits acquit* notwithstanding the variance of the vill, and may aver it to be the same; but if he be afterwards indicted in the county of *C.* for a robbery supposed to be committed in the same county of *C.* (as it must be,) he shall never plead *auterfoits acquit* of the same robbery in the county of *B.* for the justices in the county of *B.* can only inquire touching a felony in that county, and therefore it can never be averred to be the same, but it is said, that it is otherwise in an appeal. 4 *H. 7. 5. b.*

And therefore the book of 41 *Assiz. 9.* where an acquittal pleaded in a foreign county was allowed, must be intended of an indictment removed out of that county, where he was first indicted and acquitted.

If *A.* rob *B.* in the county of *C.* and carry the goods into the county of *D.* tho he cannot be indicted of robbery in the county of *D.* yet he may be indicted of larciny in the county of *D.* because the goods were carried thither; but suppose he be acquitted of larciny in the county of *D.* yet that acquittal is no bar to an indictment of robbery in the county of *C.* because it is another offense.

Nay it seems, it is no bar to an indictment of larciny in the county of *C.* for tho he be acquitted in *D.* it may be because the goods were never brought into that county, and so the felony in *C.* may not be in question, neither can the grand inquest or petit jury in the county of *D.* take notice of any felony committed in the county of *C.* and so the felony in *C.* is a distinct felony from *that* contained in the indictment in *D.*

If *A.* commit a burglary in the county of *B.* and likewise at the same time steal goods out of the house, if he be indicted of larciny for the goods and acquitted, yet he may be indicted for the burglary notwithstanding the acquittal.

And *è converso*, if indicted for the burglary and acquitted, yet he may be indicted of the larciny, for they are several offenses, tho committed at the same time. And burglary may be where there is no larciny, and larciny may be where there is no burglary.

Thus it hath happened, that a man acquitted for stealing the horse, hath yet been arraigned and convict for stealing the saddle, tho both were done at the same time.

But if a man be acquit generally upon an indictment of murder, *auterfoits acquit* is a good plea to an indictment of manslaughter of the same person, or *è converso*, if he be indicted of manslaughter, and be acquit, he shall not be indicted for the same death, as murder, for they differ only in degree, and the fact is the same. 4 *Co. Rep. 46. b. Holcroft's case per cur'*, and upon the same reason *auterfoits acquit* upon an indict-

ment of murder is a good bar to an indictment of petit treason, and *è converso*.

II. As to the second, what manner of acquittal is a good plea.

It must be an acquittal upon trial either by verdict or battle.

And therefore, if *A.* be accused and committed for felony, but no bill preferred, or *ignoramus* found, so that at the end of the sessions he is quit by proclamation, and delivered, yet he may be afterwards indicted, for he is not *legitimo modo acquietatus*.

If *A.* be assaulted upon the highway, or in his house by thieves or burglars to rob him, and he kill one of the thieves, which is no felony in law, and this matter be specially found by the coroner's inquest or grand inquest, whereupon he is discharged, yet he may be indicted *de novo* seven years afterwards for murder or manslaughter, and cannot plead the acquittal by the grand inquest.

But if he had been indicted generally of murder or manslaughter, and pleaded to it *not guilty*, and this special matter had been found by the petit jury, and thereupon judgment given, *quod eat sine die*, if he be afterwards indicted for the same fact, he may plead *auterfoits acquit*. *Crompt. fol. 28. a. Bull's case 26 Eliz.*

Therefore it is no prudence to have the matter in any case found specially by the grand inquest or coroner's [247] inquest, tho the fact being truly found by them amounts not to felony, as in the case before; and so *per infortunium*, or *se defendendo*.

If *A.* be indicted for felony, and be erroneously acquit by the mistaken direction of the judge, as, for that the felony was not committed the day mentiond in the indictment, yet that mistake lies not in averment, but to another indictment setting the day right he may plead *auterfoits acquit*. *2 Co. Instit. 318.*

If *A.* be indicted of murder or other felony, and plead *non culp.* and a special verdict found, and the court do erroneously adjudge it to be no felony, yet as long as that judgment stands unrevert by writ of error, if the prisoner be indicted *de novo*, he may plead *auterfoits acquit* and shall be discharged: *vide 9 H. 5. 2. b.* for it is the king's own suit, and tho the error appear, and regularly the judgment against the king is *salvo jure regis*, yet it is otherwise in case of life.

But if the judgment be revert the party may be indicted *de novo*; *quære*, whether in that case upon the reversal upon the point of the verdict the party shall not be executed, for the judge *a que* should have given that judgment, but it seems *in*

favorem vitæ he shall be arraigned *de novo*, for possibly he hath other matter for his defense.

If at common law *A.* had committed murder, and had been arraigned within the year upon an indictment, and had been acquitted, tho this arraignment should not have been, yet it stands as a good acquittal pleadable to another indictment or appeal: *vide* 8 *H.* 5. 6. *b.* *Coron.* 463. 16 *E.* 4. 11. *a.*

A. was indicted for the murder of *B.* by poisoning, and the indictment runs *quod B. fidem adhibens persuasioni dicti A. nesciens prædictum potum cum veneno fore intoxicatum recepit & bibit, per quod prædictus B. immèditatè post receptionem veneni prædicti obiit*; but it is not alleged, *quod venenum prædictum recepit & bibit*; upon this he was arraigned and acquitted, and had judgment, *quod eat sine die*. Afterwards he [248] was indicted again for the same offense, and pleaded *auterfoits acquit*, and shewed the record in certain, and pleaded over to the felony and murder *not guilty*.

It was resolved, 1. That the indictment was insufficient for this cause. 2. That in this case *auterfoits acquit* was no plea, because the indictment itself was insufficient, for it contained not any matter of felony. 3. And so he is not *legitimo modo acquietatus*, and so the difference is between this case and those above of an erroneous judgment, for here the foundation itself, namely the indictment contained no felony. 4. But if the error be only in the process in an appeal or indictment, and yet the prisoner appear and plead *not guilty* and be acquit, this acquittal is pleadable 19 *E.* 3. *Coron.* 444. 5. But if he had been attainted upon this insufficient indictment and judgment given, he should not have been *auterfoits arraigne* upon a new indictment for the same offense, unless the former judgment had been first reversed. 6. But *auterfoits convict* or *auterfoits acquit* by verdict, &c. is no plea, unless judgment be given upon the conviction or acquittal in any case, 4 *Co. Rep.* 44, 45. *Vauze's* case.

And the true reason of this judgment is rightly given by my lord Coke, *P. C.* 214. because the judgment upon the acquittal is only, *quod eat sine die*, which may be upon the defect in the indictment, which the judges are bound to look into, and it shall be supposed, that it was given upon that defect, and not upon the verdict, for the judgment is the same in both, but the judgment upon a conviction is, *quod suspendatur*, which is all the judgment that can be given.

But in the case of the special verdict above, where an erroneous judgment of acquittal is given, yet it is conclusive to the king till the judgment be reversed by error, for the judgment

could be only given upon the verdict, the indictment being sufficient, and so is the diversity.

And *note* generally, that where *auterfoits acquit* or *attaint* is pleaded, yet in *favorem vitæ* he shall plead over to the felony, and be tried for the same, tho his special plea be found or adjudged against him, *Vauze's case, ubi supra, &c. & 22 E. 39. b.*

III. The third general is where, and in what suits *auterfoits acquit* is a good plea.

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If *A.* be appeal'd of murder of *B.* by *C.* as son and heir of *B.* and is acquitted, and in truth *C.* was not the heir, but *D.* and thereupon *D.* brings an appeal, this *auterfoits acquit* is no plea, because not brought by the right party. 21 *H. 6. 28. b.* neither is it a bar to the king, but he may be indicted notwithstanding that acquittal, or if *D.* be nonsuit in his new appeal, he may be arraigned upon that appeal at the king's suit. 21 *H. 5. 28. b.*

If an appeal of murder or robbery be brought by *A.* against *B.* and *B.* is thereupon acquit by verdict, regularly this is a good bar to an indictment preferred by the king for the same robbery or murder both at common law and at this day.

But an acquittal by battle upon an appeal is held to be no bar to an indictment for the same offense: *vide Stamf. P. C. Lib. II. cap. 36. p. 106. b. (*)*

And at common law, if *A.* had been arraigned upon an indictment for murder or robbery, tho within the year, if an appeal be after brought for the same crime *auterfoits acquit* upon the indictment had been a good bar to the appeal, 16 *E. 4. 11. a.*

And therefore the justices at common law would rarely arraign a prisoner upon an indictment, especially for murder within the year after the death in favour of the appeal. 22 *E. 4. Coron. 44.* unless the appellant had been an infant 32 *H. 6. Coron. 278 & 279.* or the evidence had been very pregnant. 21 *H. 6. 28. b.*

But now by the statute of 3 *H. 7. cap. 1.* in case of murder or manslaughter the justices shall proceed to arraign the prisoner upon an indictment, tho within the year; and if the principal or accessory be acquitted or attainted within the year and day, yet this shall be no bar to an appeal against them, [250] as if there had been no such acquittal, and therefore tho upon the indictment the offenders be acquit within the year,

(*) The reason assigned for this by *Stamford* is, because trial by battle does not lie against the king, wherefore he shall not be bound by such trial, yet *Stamford* makes a *quære* of this, for *Bract. Lib. III. cap. 19. § 8.* is express to the contrary, and says, that if he be acquit by battle, he shall go quit not only against the appellants, but also from the suit of the king, *quia per hoc purgat innocentiam suam versus omnes, ac si se poneret super patriam, & patria omnino ipsum acquietaverit.*

the court ought not to discharge them, but at discretion to bail or commit them, till the year and day be past, *vide le statute*.

So that by this statute *auterfoits acquit* or *attaint* upon an indictment of murder or manslaughter is no bar of an appeal for the same death, tho on the other side *auterfoits acquit* or *attaint* upon an appeal stands still a good bar to an indictment for the same murder or manslaughter. *Stamf. P. C. ubi supra. 4 Co. Rep. 40. a. Darley's case.*

But *auterfoits convict* of murder or manslaughter, and had his clergy upon an indictment is a good bar to an appeal notwithstanding this statute, for indeed the statute itself hath this exception, *the benefit of clergy not being had, 4 Co. Rep. 45. b. Wigg's case*, and this, tho an appeal were depending, whereunto the prisoner had not pleaded at the time of his acquittal. *4 Co. Rep. 45. b. Holcroft's case.*

But the case of other appeals, as of robbery, rape, &c. are not within this statute, and therefore *auterfoits acquit* upon an indictment within the year stands as at common law a good bar to an appeal of robbery, or any other offense other than murder or manslaughter.

And yet at this day the judges never forbear to proceed upon an indictment of robbery, rape, or other offense, altho within the year, and the reason is, because appeals of robbery especially are very rare, and of little use since the statute of 21 H. 8. cap. 11. gives restitution to the prosecutor upon an indictment, as effectually as upon an appeal.

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CHAPTER XXXII.

CONCERNING THE PLEA OF AUTERFOITS ATTAINT OR CONVICT OF THE SAME FELONY, OR ANY OTHER OFFENSE.

If *A.* be indicted and convict of felony, but hath neither judgment of death, nor hath prayed his clergy; this is no bar of a new indictment for the same offense, if the first were insufficient. *4 Co. Rep. 45. a. Vaux's case*, and it seems, tho it were sufficient, yet it is no bar without clergy or judgment; but if he had his clergy allowd him, *auterfoits convict* and had his clergy is a good bar to an indictment, or an appeal for the same crime, and so remains at this day, notwithstanding the statute of 3 H. 7. cap. 1. *4 Co. Rep. 40. a. 45. b. Wigg's case.*

And so it is tho he prays his clergy, and the court will advise

upon it, tho the clergy be not actually allowd. (*) 4 Co. Rep. 46. a. *Holcroft's* case. Co. P. C. cap. 57.

Auterfoits attaint de mesme felonie, tho upon an insufficient indictment, was at common law a bar to appeals, as well as indictments of the same offense. 4 Co. Rep. 45. a. *Vauxe's* case, and remains so still at this day in all cases but in appeals of death, which is altered by the statute 3 H. 7. cap. 1.

If *A.* be attaint of felony by outlawry, yet, if he reverse the outlawry, he shall be put to answer the same felony, and plead to the indictment, whereof he was outlawd; but if he reverse the outlawry for this error, because he was *auterfoits* acquit for the same felony, (which, as before is said, is assignable for error,) he shall be discharged of the indictment, for it stands as well a plea to the indictment, as an error in the outlawry.

If *A.* be indicted of piracy and refusing to plead hath judgment of *peine forte & dure*, and by the gene- [252] ral pardon piracies are excepted, but the judgment of *peine forte & dure* is pardoned by the general words of all contempts, *quære*, whether he may be arraigned for the same piracy, but by the better opinion he may be arraigned of any other piracy committed before that award, 14 Eliz. Dy. 308. a.

If *A.* be attaint of treason or felony by outlawry, yet he shall not be *de novo* indicted or appeal'd for the same felony till the outlawry be reversed, for *auterfoits* attaint of the same felony is a good plea. Co. P. C. 213.

Auterfoits attaint de murder is a good plea to an indictment of petit treason.

If *A.* had been indicted at common law of felony, and had judgment of death, yet he may notwithstanding his attainder be arraigned for treason committed before the felony for the advantage of the king, who is to have the escheat, but not for a treason committed after the felony. 1 H. 6. 5. b. *Stamf. P. C. Lib. II. cap. 37. fol. 107. b.* But in this my lord *Coke* differs from *Stamford*, and saith that for a treason committed *after* he shall be arraigned. Co. P. C. p. 213. (a)

If *A.* commit divers robberies, one upon *B.* another afterwards upon *C.* and afterwards another upon *D.* and they bring several appeals, and he be attaint at the suit of *B.* yet he shall be put to answer to the appeals of *C.* and *D.* for the benefit of the restitution of their goods. *Stamf. ubi supra.*

And if there be an indictment and attainder at the prosecution of *B.* yet *quære*, whether after at the prosecution of *C.* he may not be put to answer an indictment at his prosecution to

(*) See the case of *Armstrong* and *Lisle*, *Kel.* 103, 104.

(a) The case in 1 H. 6. 5. b. was of a treason subsequent to the felony, and therefore rather makes against *Stamford* in favour of lord *Coke's* opinion.

have benefit of restitution upon the statute of 21 *H. 8. cap. 11. Stamf. Lib. 3. cap. 10.*

It seems in that case there may be an inquest of office to inquire of the robbery of *C.* so as to intitle him to restitution without arraigning the party upon an indictment of *C.*

If *A.* commit several felonies and be attaint for one [253] of those felonies, and the king pardon that attainer and the felony, for which he was attaint, if he be after indicted or appeal'd for the same felony, he may plead his attainer, and it will be no good replication to say he was pardoned after.

But yet he may be indicted or appeal'd for the other felonies, and if he plead his former attainer, it is a good replication to say he was pardoned after, whereby he is now restored to be a person able to answer to those offenses. 6 *H. 4. 6. b. 10 H. 4. Coron. 227. vide contra Co. P. C. p. 213.*

And so if a person attaint commit a felony after, and be pardoned the first felony and attainer, yet he shall be put to answer the new felony. 6 *H. 4. 6. b.*

If *A.* commit several felonies and be convict for one of them, but no judgment of death nor clergy given him, he may be indicted for all those former felonies. *Stamf. ubi supra.*

But if he had been convict for any one felony and prayed his clergy, and read and been deliver'd to the ordinary, he should never be arraigned for any of those former felonies. And it seems by the better opinion, that if he had prayed his clergy, & *tradito ei libro legit ut clericus*, but no award of *traditur ordinario*, yet he should not be arraigned for any felony committed before his clergy allow'd, for it was the fault of the court, that they did not award *tradatur ordinario*. 4 *Eliz. Dy. 211. b. Co. P. C. cap. 57.*

And the reason is, because the statute of 25 *E. 3. cap. 5. pro clero* enacts, that he shall be arraigned of all his offenses together, and then deliver'd to the ordinary, and therefore if once deliver'd to the ordinary, all his capital offenses committed before are in effect discharged, and therefore at least before the prisoner departs from the bar after his clergy allow'd, he must be indicted, or otherwise he is for ever discharged.

But for any felony committed after conviction and clergy allow'd, he may be indicted and arraigned, but not if he stands attainted and unpardoned.

[254] But at this day that old law concerning the discharge of offenses by clergy allow'd is alter'd.

By the statute of 8 *Eliz. cap. 4.* it is enacted, "That if any person admitted to his clergy shall before such his admission have committed any offense, whereupon clergy is not allowable,

by the laws and statutes of this realm, and not being thereof indicted and acquitted, convicted or attainted, or pardoned shall and may be indicted or appeal'd for the same, and put to answer, as if no such admission to clergy had been.

And by the statute of 18 *Eliz. cap. 7.* delivery to the ordinary is taken away, and burning in the hand wholly substituted in lieu thereof, and that every person admitted to his clergy shall answer such felonies or offenses, as he should have done, if he had been deliver'd to the ordinary and made his purgation.

So that now clergy doth discharge all offenses precedent within clergy, but not such other offenses, as are out of the benefit of clergy.

There remains one special kind of *auterfoits acquit* of another person, than he that pleads it, which I shall mention and so conclude this chapter.

The accessory upon his arraignment may plead the acquittal of the principal.

A gaoler arraigned for the voluntary escape of a prisoner for felony may plead the acquittal of the felon of the principal felony, and so may the rescuer arraigned upon an indictment for rescue of a felon, and that is the reason, that the gaoler and rescuer shall never be arraigned till the principal felon be tried and convicted, because if he be acquitted, the gaoler or rescuer cannot be guilty of felony.

If *A.* steal the goods of *B.* and break prison, *A.* may be arraigned for the felony of breaking prison before the arraignment upon the principal felony, but if *A.* be arraigned upon the principal felony and acquitted before conviction of the felony for breaking the prison, *A.* may plead this acquittal, for hereby that felony is purged before his conviction, this was *Mrs. Samford's* case in *Kent* for stealing the goods [255] of the earl of *Leicester*.(*)

To conclude this whole matter of *auterfoits acquit*, *convict* or *attaint* these things are to be observed. 1. The party that pleads the record must plead it specially setting forth the record. 2. He must either shew the record *sub pede sigilli*, or have the record removed into the court, where it is pleaded by *certiorari*, or if it be a record of the same court must vouch the term, year and roll, for the record is part of his plea. 3. He must make averments, as the case shall require, as that he is the same person, that it is the same offense. 4. No issue shall be taken upon the plea of *nul tiel record*, because it is pleaded in court, but the king's attorney may have *oyer* of the record. 5. The averments are issuable. 6. If issue be taken upon them they shall

(*) *Vide supra*, Part I. p. 612.

be tried by the jury, that is returned to try the prisoner by the statute of 22 H. 8. cap. 14. 7. He, that pleads these pleas, must also plead over *not guilty* to the felony, for if the pleas be adjudged against him, yet he shall be tried upon the *not guilty*. [1]

[1] As to the pleas of *autrefois acquit* & *autrefois convict*, see Whart. C. L. 136, where the English and American cases are collected and considered. Two things are necessary to constitute a good plea of *autrefois acquit*; first, that the former acquittal should have been regular; secondly, that the first indictment should have been sufficient. Arch. C. P. 106; *State v. Cooper*, 1 Green, 361; *State v. Brown*, 16 Conn. 54. A legal acquittal in any court of competent jurisdiction, if the indictment be good, will be sufficient to preclude any subsequent proceedings before every other court. 2 Hawk. c. 35, s. 10; *Bailey's case*, 1 Virg. Cas. 188, 248, 258; *Com. v. Goddard*, 13 Mass. 457; *Wortham v. Com.* 5 Rand. 669; *Com. v. Cunningham*, 13 Mass. 245. An acquittal by a competent tribunal abroad is a bar to an indictment for the same offence before any other court. *R. v. Hutchinson*, 1 Leach, 135, B. N. P. 245. But, in this case, the defendant should produce an exemplification of the record of his acquittal under the public seal of that state or kingdom where he has been tried and acquitted. *Hutchinson's case*, 3 Keb. 785; and see *Beak v. Thyrahit*, 3 Mod. 194, Show. 6; *R. v. Roche*, 1 Leach, 134. An acquittal upon an indictment in a wrong county cannot be pleaded to a subsequent indictment for the offence in another county. *Vaux's case*, 4 Rep. 45, s. 46, b. Com. Dig. Indict. (1.) A conviction of a breach of the peace before a magistrate, on the confession or information of the offender himself, is no bar to an indictment by the grand jury for the same offence. *Com. v. Aldermen*, 4 Mass. 477. A person may be indicted for an assault committed in view of the court, though previously fined for the contempt; for this is an act which constitutes two offences, one against the law which protects the sanctity of courts of justice, the other against the general law which maintains the public order and tranquillity. *State v. Yancy*, 1 Car. L. R. 519. See 2 Opinions of the Atty. Gen. 958. Even the entry of a *nolle prosequi* by the proper authority is no bar to a subsequent indictment for the same offence. *State v. McNeil*, 3 Hawks. 183; *Com. v. Wheeler*, 2 Mass. 172; *Com. v. Lindsay*, 2 Virg. Cas. 345; *State v. Haskett*, 3 Hill, S. C. R. 95; *U. S. v. Shoemaker*, 2 McLean, 114. A former conviction procured by the fraud of the defendant is no bar to a subsequent prosecution. *Str.* 707, *State v. Little*, 1 N. Hamp. 268; *State v. Brown*, 16 Conn. 54; *Com. v. Jackson*, 2 Virg. Cas. 501. Where the defendant, at a previous term, had pleaded to another indictment for the same offence, it was held that the former indictment being still pending, was no bar to a trial on the second. *Com. v. Dunkam*, 1 Boot. Law Rep. 145, *Thatcher's C. C.* 513. But if, after a prisoner has pleaded to an indictment, and after the jury has been sworn and evidence offered, the public prosecutor, without the consent of the prisoner, withdraw a juror merely because he is unprepared with his evidence, the prisoner cannot afterwards be tried on the same indictment, and if he be tried and convicted, judgment will be arrested. *People v. Barrett*, 2 Caines, 304. The true test by which the question, whether the plea of *autre fois acquit* is a sufficient bar in any particular case, may be tried, is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. Arch. C. P. 106, *R. v. Clark*, 1 B. & B. 473; *People v. Barrett*, 1 Johns. 56; *Com. v. Cunningham*, 13 Mass. 245; *Hite v. State*, 9 Yerg. 357; *Com. v. Halstat*, 2 Boot. Law Rep. 177; *Com. v. Curtiss*, *Thatcher's C. C.* 209; *Com. v. Goodenough*, id. 133; *Gerrard v. People*, 3 Scammon Ill. Rep. 363; *State v. Ray*, Rice 1; *State v. Risler*, 1 Richardson, 219. If the charge be in truth the same, though the indictment differ in immaterial circumstances, the defendant may plead his previous acquittal with proper averments; for it would be absurd to suppose that by varying the day, parish, or any other allegation the precise accuracy of which is not material, the prosecutor could

change the right of the defendant, and subject him to a second trial. 1 *Burn's J.* 312; *Hite v. State*, 9 *Yerg.* 357. But if the crimes charged in the two cases are so distinct that evidence of the one will not support the other, it is inconsistent with reason and law, to say that they are so far the same that an acquittal of the one will be a bar to the prosecution of the other. *Id.* The rule is, that if the prisoner could have been legally convicted on the first indictment, upon any evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence were adduced at the trial of the first indictment or not. 1 *Burn*, 312. Where judgment has been arrested for any defect in the indictment, a new one may be preferred, correcting the error, and the former cannot be pleaded in bar, as where there has been a final judgment of acquittal or conviction. *Writhpole's case*, *Cro. Car.* 147; *Ld. Raym.* 922, *Fost.* 104; *R. v. Wilday*, 1 *M. & S.* 188, 2 *C. & P.* 640; *Com. v. Durham*, 1 *Bost. Law Rep.* 145; *People v. Cashburn*, 13 *Johns.* 351; *State v. Phil.* 1 *Stewart*, 31. A defendant who has been acquitted upon one of several counts in an indictment, is entirely discharged therefrom, nor can he be a second time put upon his trial upon that count. *Campbell v. State*, 9 *Yerg.* 333. An acquittal upon an indictment for a felony, is no bar to an indictment for a misdemeanor, and *e converso*. 2 *Hawk. c.* 35, *s.* 5. So an acquittal upon an insufficient indictment is no bar to another indictment for the same offence. *R. v. Cogan*, 2 *Leach*, 503; *R. v. Phillips*, 1 *Lond. Jurist*, 427; *R. v. Taylor*, 3 *B. & C.* 502; *Com. v. Mortimer*, 2 *Virg. Cas.* 325; *Hite v. State*, 9 *Yerg.* 337; *State v. Risher*, 1 *Richardson*, 219; *Com. v. Wade*, 17 *Pick.* 395; *State v. McGraw*, 1 *Walk.* 208.

An acquittal on an indictment for a greater offence, is a bar to a subsequent indictment for a minor offence included in the former. *People v. McGowan*, 17 *Wend.* 366; *State v. Cooper*, 1 *Green*, 361; *State v. Lewis*, 2 *Hawks.* 98; *State v. Sandiferd*, 5 *Porter*, 523. When the first charge is for a felony, and the second for a mere misdemeanor, the previous acquittal will be no bar. 1 *Leach*, 12, 12 *East*, 415; *Com. v. Gable*, 7 *S. & R.* 423. An acquittal on an indictment for a minor offence is generally no bar to a subsequent indictment for the greater. An acquittal, however, for manslaughter is a bar to a future prosecution for murder, for if the defendant were innocent of the modified offence, he could not be guilty of the same fact, with the addition of malice. 4 *Rep.* 45, *Fost.* 329, 12 *Pick.* 504. But a conviction for an assault with an intent to kill, would be no bar to an indictment for murder. *Com. v. Roby*, 12 *Pick.* 496.

The plea must consist of matter of record, viz. the former indictment and acquittal, and the circumstances; and of matter of fact, viz. the identity of the person acquitted, and the fact of which he was acquitted. 2 *Hawk. c.* 35, *s.* 3, 1 *Burn*, 314, 1 *M. & S.* 188. For the form of a plea of *autrefois acquit*, see 1 *Burn*, 316, *Arch. C. P.* 108. The proof of the issue lies upon the defendant; he must first prove the record and then the averment of identity contained in his plea. See *R. v. Parry*, 7 *C. & P.* 836; *R. v. Bowman*, *id.* 101, 337. The judgment against the defendant, in felonies, is *respondent ouster*. *R. v. Vandercomb*, 2 *Leach*, 708; *R. v. Sheen*, 2 *C. & P.* 635. In misdemeanors the judgment is final. *R. v. Goddard*, *Ld. Raym.* 922; but see *Barge v. Com.* 3 *Penn.* 262; *Com. v. Foster*, 8 *Watts & Serg.* 77, 13 *Muss.* 455. When the plea is allowed, the judgment is that the defendant shall go without day, and he is altogether discharged from the prosecution. 1 *Dracon*, 80. See 1 *Burn's J.* 312, *Arch. C. P.* (edit. 1846) 106.

CHAPTER XXXIII.

CONCERNING PLEAS TO THE FELONY, VIZ. NOT GUILTY.

REGULARLY, where a man pleads any plea to an indictment or appeal of felony that doth not confess the felony, he shall yet plead over to the felony *in favorem vitæ*, and that pleading over to the felony is neither a waving of his special plea, nor makes his plea insufficient for doubleness. 22 E. 4. 39. b.

And therefore, if he pleads any matter of fact to the [256] writ or indictment, or pleads *auterfoits convict*, or *auterfoits acquit* he shall plead over to the felony; and altho he doth it not upon his plea, but his plea be found or tried against him, yet he shall not be thereby convict without pleading to the felony and trial thereupon. 22 E. 4. 39. b.

But if a man plead to the jurisdiction of the court, as if an indictment of rape be found before the sheriff in his *Turn* and delivered to the justices, because the sheriff hath no jurisdiction to take an indictment of rape, the prisoner may plead to it without answering to the felony, thus it was done, 22 E. 4. 22. b. which was one *Wheeler's* case; so if the justices of the peace should arraign one for treason.

Or if a man plead a plea, that confesseth the fact, as a release in an appeal, he shall not plead over to the felony. 22 E. 4. 39. b. 9 H. 4. 1. b.

But yet even in that case it seems to me, that he may, if he please, plead over to the felony *not guilty*, and accordingly it is held by *Markham*, 7 E. 4. 15. a. in case of a release.

If *A.* be indicted of felony and plead the king's pardon, for instance, if the indictment be of murder, and the party plead a pardon of felonies, or the like, he shall not need to plead over to the felony, because it suits not with his plea.

And yet, if the pardon upon a demurrer of the king's attorney, or upon advisement of the court be adjudged insufficient, the party shall not be thereupon convict, but shall be put to plead to the felony and be tried for it, and yet the pleading of the pardon is a kind of confession of the fact, but yet *in favorem vitæ* the party shall be put to answer the felony;(*) and thus it was done in the case of *Rutaby*,(†) who was indicted for murder in *Durham*, and the indictment removed by *certiorari* into the king's bench, and there he pleaded the king's par-

(*) *Vide supra*, p. 239.

(†) *Vide supra*, Part I. p. 467, Part II. p. 212.

don of murder, which for some defects were adjudged insufficient to pardon him.

He was thereupon remanded, and the indictment remitted, and tried for the fact in *Durham*, and, as I have heard, acquitted. *Hill* 1653.

And regularly in all cases of felony or treason, where a man pleads a special matter, tho he conclude his plea [257] with *not guilty* to the felony, or doth not conclude it so, yet if his plea be tried or found, or ruled against him, he shall be put to his plea of *not guilty* and be tried for the felony, for tho a man shall lose his land in some cases for mispleading, yet he shall not lose his life for mispleading. *Stamf. P. C. Lib. II. cap. 34. fol. 98. b.*

And therefore the book of 14 *E. 4. 7. a.* that saith, if the appelee demurs, and it be judged against him, it is peremptory, and he shall be executed, must be understood *cum grano salis*; and therefore *Brook* in abridging it, *B. Peremptory* 86. makes doubt of it.

But the true difference seems to be this, if a person be indicted or appeal'd of felony and he will demur to the appeal or indictment and it be judged against him, he shall have judgment to be hanged, for it is a confession of the indictment, and indeed a wilful confession, for he may have all the advantages of exception to the insufficiency of the indictment or appeal by way of exception either before his plea of *not guilty*, or after his conviction and before judgment, as he might have by demurrer, and in case of his demurrer no judgment of *peine fort & dure* can be given, because the demurrer is a plea, and thus the book of 14 *E. 4. 7. a.* and 7 *E. 4. 29. a.* are to be understood, and accordingly 2 *Co. Instit.* 178. *super stat. Westm. 1. cap. 12.*

But if the prisoner pleads in bar, and concludes, as he ought to the felony, or plead a pardon, where he concludes not to the felony, and the attorney general demur, and he join in demurrer, and it be adjudged against the prisoner, yet he shall be put to answer the felony, for this demurrer is no confessing of the indictment, and it is all one, as if his plea were found against him by the jury, or by certificate of the bishop, which yet is not so peremptory(a) but he shall be after tried for the felony. *Stamf. P. C. Lib. II. cap. 34. fol. 98. b.*

If *A.* be indicted of murder and he hath the king's pardon of manslaughter, if he be arraigned upon the [258] indictment for murder, he must not plead generally *not guilty*, for then he waves his pardon, but he must confess

(a) See 14 *E. 4. 7. a.*

the indictment as to manslaughter and plead thereunto the king's pardon, and as to the murder, *viz. interfection' ex malitiâ præcogitata* he is to plead *not guilty*, and if he be found guilty of murder, he shall have judgment, if acquit of the murder, then his plea shall be allowd, and thus I directed it in Sir *Thomas Pettus's* case in *Norfolk* about 24 *Car. 2.* and it is pursuant to the direction of the statute of 13 *R. 2. cap. 1.* which requires, that before the pardon allowd it shall be inquired by the country, whether the party were slain of malice prepense, and if so, the pardon to be disallowd.

Now the plea to the felony consists of two parts, *viz. 1.* The issue of *not guilty*, whereunto the clerk joins issue *cul. prist.* 2. The putting himself upon the country, when the clerk demands how he will be tried.

If either of these fail, it is in law a standing mute, whereupon in case of felony he is put to his penance, and in case of treason he hath judgment, as upon a *nilhil dicit*, and so is attainted. 14 *E. 4. 7. a.*

In case of an indictment of felony or treason there can be no justification made, as a man cannot plead, that what he did was *se defendendo*, or in his defense against a burglar or robber, tho it amount in truth to no felony.

And the reason is, because the indictment supposeth in treason, that the fact was done *proditoriè & contra ligantiz sue debitum*, and in felony, that the fact was done *felonicè*, which is the point of the indictment, and must be answered directly, but upon *not guilty* pleaded he shall have the advantage of all such defenses, as he can make to acquit himself of the felony or treason, and may give all his special defense in evidence, tho the matter of fact be proved upon him, and so it is the most advantageous plea for the prisoner.

If duress and compulsion from others will excuse him or his own necessary defense in safe-guard of his life, or any other matter, the jury upon the general issue ought to take [259] notice of it, and to find their verdict accordingly, as effectually, as if it were or could be specially pleaded.

And now we have brought the prisoner to his trial, wherein we shall now proceed. And these trials of prisoners are of two kinds, *viz. by battle*, or by the jury.

The former doth not concern indictments, for therein there is no trial by battle, but concerns only appeals and approvers, and I shall therefore defer the discussion of trials by battle, till I come to consider of appeals in the end of this book, and proceed to the business of trial by jury.[1]

[1] The general issue is pleaded by the prisoner *vis. voce* at the bar, in these words, "*Not Guilty*;" by which plea, since the 7 & 8 *Geo. IV. c. 28. s. 1.* without

further from, every person, not having privilege of peerage, upon being arraigned upon any indictment for treason, felony, or piracy is deemed to have put himself upon the country for trial. A prisoner who had been previously tried and convicted, but whose trial was deemed a nullity on account of some informality in swearing the witnesses, was arraigned again upon an indictment for the same offence, and refused to plead, alleging that he had been already tried; *Littledale, J. and Vaughan, B.* ordered a plea of not guilty to be entered for him. *R. v. Bitton*, 6 C. & P. 92. Where a prisoner has pleaded guilty to a charge of felony, and sentence has been passed upon him, he cannot afterwards retract his plea and plead not guilty. *R. v. Sell*, 9 C. & P. 346.

The general issue makes it incumbent upon the prosecutor to prove every fact and circumstance constituting the offence, as stated in the indictment. On the other hand the defendant may give in evidence, under this plea, not only every thing which negatives the allegations in the indictment, but also all matter of excuse and justification.

If the defendant gives any evidence, whether written or parol, the counsel for the prosecution has the right of reply. Even if the evidence for the defendant be only to his character, it gives in strictness, a right of reply, although it is seldom exercised in such case. If two prisoners are indicted jointly for the same offence, and one call witnesses, it seems that the counsel for the prosecution is entitled to a general reply; but if the offences are separate, and they might have been separately indicted, he can reply only in the case of the party who has called witnesses. *Arch. C. P.* 115; *R. v. Hayes*, 2 M. & Rob. 155; *R. v. Jordan*, 9 C. & P. 118. Whenever the defendant gives evidence to prove new matter by way of defence, which the crown could not foresee, the counsel for the prosecution is entitled to give evidence in reply to contradict it. See *R. v. Frost*, 9 C. & P. 159; 5 *Burn's J.* 561; 1 *Chit. C. L.* 471; *Davis' Virg. C. L.* 447.

CHAPTER XXXIV.

TOUCHING THE TRIAL OF OFFENDERS BY JURY, AND FIRST, THE PROCESS.

AFTER the prisoner hath pleaded and put himself upon the country, the next thing in order of proceeding is the trial of the offender.

And therein these things will be necessary to be considered. 1. The process; that brings in the jury to try the prisoner. 2. The return to be made of them, and of what nature and quality they ought to be. 3. What is to be done, if they appear not, or be challenged off. 4. Concerning the challenge of the king, or of the prisoner unto them, if they do appear. 5. The trial and allowance, or disallowance of the challenge. 6. The order of the swearing of the jury. 7. The evidence to be given to the jury, what, and how, and in what manner. 8. The demeanor of the jury before and at the time of the delivering of the verdict. 9. The verdict itself, how to be given and ordered

by the jury and by the court. 10. What is to be done in case of miscarriage of the jury either in their verdict, or the circumstances that attend it.

I. And first therefore I will consider what, and how process is to issue to bring in the jury.

And this will be various according to those courts or judicatories, wherein the prisoner is to be tried, *viz.* 1. In the king's bench. 2. Before commissioners of *oyer* and *terminer*. 3. Before justices of gaol-delivery. 4. Before justices of peace, for these are the usual tribunals, where matters of this nature are determined.

1. Therefore, as to the king's bench.

If the offense be committed in the county, where the king's bench sits, and the indictment be originally taken in the king's bench, and the prisoner arraigned there, the court may proceed *de die in diem* in the term-time, and there needs not fifteen days between the *teste* and return of the *venire fac'* to bring in the jury. 9 *Co. Rep.* 118. *b.* lord *Sanchar's* case.

And the same law is, if the offense be committed in the same county where the king's bench sits, and the indictment be taken before justices of peace of the same county, and removed into the king's bench by *certiorari*, and the prisoner be there arraigned and plead.

But if the offense be committed, and the indictment taken in another county than where the king's bench sits, and it be removed into the king's bench by *certiorari*, and the prisoner be there arraigned and pleads, there must be fifteen days between the *teste* and return of the *venire fac'* or other process. Lord *Sanchar's* case. 9 *Co. Rep.* *ubi supra*.

The *venire fac'* as all other process of that court, issues in the king's name under the seal of the court and *teste* of the chief justice, and always ought to bear *teste* after the issue joined between the king and the prisoner.

2. As to the commission of *oyer* and *terminer*. Tho there goes out a general precept in the name of three or more of the commissioners, and under their seals fifteen days before their session directed to the sheriff to return twenty-four jurors to try the issue between the king and the prisoners to be [261] arraigned, yet this is but preparatory, and to have a jury in readiness; for after the prisoners are arraigned and pleaded to the country a precept ought to issue to the sheriff in nature of a *venire facias*, which may bear *teste* the same day, that the prisoners plead, commanding the sheriff to return twenty-four, &c. to try the issue upon such a day, and this precept must be in the names and under the seals of the commissioners or three of them, whereof one of the *quorum*,

4 Co. *Instit. cap.* 28. p. 164. and not barely by an award upon the roll.

Or they may make their precept returnable the same day that the prisoner pleads, viz. *ad horam primam post meridiem*, &c. for justices of *oyer* and *terminer* may take their indictment, and arraign the prisoner and try him the same day, against the opinion of 22 E. 4. *Coron.* 44. as appears by the precedents cited 4 Co. *Instit. ubi supra*, and by common experience.

If they make their precept returnable any day after, as for instance the second day of the sessions, they must not only make an adjournment, but record the adjournment, or else it will be intended returnable after their sessions, for the sessions is intended only the first day and no longer, unless an adjournment be entred.

3. Justices of gaol-delivery, after the prisoner hath pleaded, may take his pannel from the sheriff without making any precept to him, 4 H. 5. *Enquest* 65. 4 Co. *Instit. cap.* 30. p. 168. the reason given is, because justices of gaol-delivery send out a general commandment to the sheriff before their session to return juries against they come, otherwise it is, where they have a special commission *per Hankf.*

But this is not the reason, for so it is done by justices of *oyer* and *terminer* and justices of peace, and yet they make special precepts of *venire fac'* vide *antea*, cap. 4.

4. Justices of peace, as to the point of their precepts of *venire fac'* agree with justices of *oyer* and *terminer*, for they are as to this purpose commissioners of *oyer* and *terminer*, and may indict, arraign and try the same day in cases of felony, as it is agreed 4 Co. *Inst. p.* 164. and usual practice. [262]

Now there be certain general observations touching the process against the jury.

1. In all cases, where the process is by writ or precept, as well the award, as the writ or precept ought to mention truly the *visne*, from whence the jury shall come, and where it is only by award without writ or precept, as in case of the justices of gaol-delivery, the award ought to mention the *visne* from whence the jury shall come.

As if a murder be supposed to be at *D.* the *venire fac'* ought to return a jury *de vicineto de D.*

If the murder be alledged *apud civitatem Bristol*, the *venire fac'* is most properly *de Bristol*, and it is good, because a city, 7 H. 4. 13. a. *Enquest* 36. but if it be from a place not a city, it must be *de vicineto de D.*

But tho it be a city, yet the *venire fac' de vicineto civitatis Bristol* is good, tho it be also a county, as hath been often re-

solved against the opinion of *Stamford, Lib. III. cap. 4. fol. 154. b.*

If the stroke be laid at *B.* and the death at *C.* in the same county, the *venire fac'* must be *de vicineto B. & C.* because both make the felony.

But by the statute, (a) where the stroke is in one county, and the death in another, the indictment shall be, where the death was, and the *visne* shall be from the place, where he is alledged to die, for necessity, because the process is not to go into the other county.

If a murder be laid *in quadam plated vocat' Kings-street in parochiâ Sanctæ Margaritæ apud civitatem Westm.* the *visne* shall be neither from *Kings-street*, because it is alledged to be only *platea* nor *de vicineto civitatis Westm.* but *de vicineto parochiæ Sanctæ Margaritæ*, because more certain. 6 *Co. Rep. 14. a. Arundel's case.*

But if a murder be laid *apud B. in parochiâ de C. venire fac'* shall be *de vicineto de B.* because more certain, for it shall be intended a vill or hamlet within a parish, and by [263] common intendment a parish may contain many villa. 11 *Co. Rep. 25. b. Harper's case.*

But at this day by the statute of 22 *H. 8. cap. 2.* made perpetual by 32 *H. 8. cap. 3.* if a foreign plea be pleaded in case of an indictment of felony, it shall be tried by the jury, that should try the issue of *not guilty*, but in case of an indictment of treason, as I have before said, that statute takes not place, but it shall be tried by a jury of that place or county, where the foreign matter pleadeth ariseth.

2. As to the number of the jury the *venire fac'* or precept is only *venire fac'* twelve, but the sheriff ought to return twenty-four.

But the general precept, that issues before a sessions of gaol-delivery, *oyer* and *terminer*, and of the peace before mentioned is to return twenty-four, and commonly the sheriff returns upon that precept forty-eight.

But the award or precept to try the prisoner after he hath pleaded his only *venire fac'* twelve, and twenty-four are returned by the sheriff upon that pannel.

3. Touching the manner of the precept, writ, or award.

If *A. B. C.* and *D.* be indicted for one felony or murder before any justices, they may issue one *venire fac'* or may issue several *venire fac'* or precepts, or awards of that kind.

If the *venire fac'* be joint, then if *A.* challenge twenty peremptorily, or challenge for cause, the jurors challenged shall be

drawn against all, for each may have his several challenge, and the like, if it were in an appeal; so that, if there were eighty upon the pannel, they may be all challenged off by their several peremptory challenges, which is a great inconvenience, and therefore in such case they antiently used to sever the prisoners, and so put them to challenge apart, whereby they may possibly hit upon the same persons. 9 *E.* 4. 27. *b.* 21 *H.* 6. 22. *a.* 22 *H.* 6. 4. *a.* therefore the best way is to make out several *venire fac'* and consequently, if the pannel be challenged off, yet forty *tales* may be granted upon each *venire fac'*.

And if the *venire fac'* in an appeal be once granted jointly, it cannot be afterwards severed, neither can there be several *tales*, for if the *venire fac'* be joint, the *tales* [264] must be joint. 27 *H.* 6. 5 & 6.

And it seems, that in case of an indictment, tho it be the king's suit, if once a *venire fac'* issue joint, there cannot issue a several *venire fac'* nor a several *tales*, which in many cases may much delay, if not frustrate the trial.

But before justices of gaol-delivery, where there is no precept but only an award, tho at first the award be joint, and the pannel accordingly returned by the sheriff, and the prisoners challenge peremptorily severally, whereby there are not enough left upon the pannel to try them, and a *tales* is awarded returnable the next day, yet the court may sever the first award and also the *tales*. *Plow.* 100. *a. b.* *Salisbury's* case adjudged.

It is therefore considerable, whether the difference between the cases of the old books and this be, that those were of an appeal, which is the party's suit, and this of an indictment, which is the king's suit, or rather, (as I think,) because this was in case of justices of gaol-delivery, where there is neither writ nor precept, but a command *ore tenus*, and when the record is made up, then an award upon the roll, which the justices may model, as they please, at any time before the trial, and requires not such strict formality as a writ. 4 *H.* 5. *Enquest* 55.

II. The second general is touching the return of the sheriff upon the precept, and the quality of the jurors.

Upon the writ or precept, or command to the sheriff he ought to make the return, whether the place or *visne* be within a franchise or not, and cannot return a *mandavi bullivo*, as in some cases of appeals, for here the writ is for the king, and therefore with a *non omittas propter aliquam libertatem*.

The writ commands him to return *duodecim liberos & legales homines de vicineto*; they must be, 1. Freemen and regularly freeholders. 2. *Legales*, without any just exception. And 3. They are to be *de vicineto*, but this is not necessarily required,

for they of one side of the county are by law *de vicineto* to try an offense of the other side of the county.

But concerning the quality of the jurors more shall [265] be said, when we come to consider of challenges.

The jurors returned by the sheriff were, at common law, those, that were to try the prisoners, but by the statute of 3 H. 8. cap. 12. all pannels returned by sheriffs or their ministers, (which be not between party and party,) before any justices of gaol-delivery, or of the peace, whereof one of the *quorum*, shall be reformed by putting to, and taking out the names of the persons impannelled, by discretion of the justices, before whom such pannel shall be returned, and the pannels so reformed shall be good and lawful, and the sheriff shall return the pannel so reformed upon pain of 20*l*.

This statute, which began to be set on foot 11 H. 7. cap. 24. hath much reformed many practices of sheriffs in packing of juries in cases capital.

Note, tho the preamble of this statute mentions inquests of inquiry, the body of the act seems to extend to all pannels, as well of the petit jury, as of the grand inquest, and so it hath been constantly practised, for if a prisoner be arraigned before the judge that sits upon the crown-side, it hath been always usual for the judge to send for a jury to the judge of *nisi prius*, and when the jury is brought, the sheriff returns them between the king and the prisoner, which is by virtue of this statute.

Where the jury must be *de medietate lingue*, and other matters relating to the quality of the jurors will be considered, when we come to consider of challenges.

III. The third general is to consider what is to be done, if the jury appear not, or be so challenged off, that there are not enough upon the pannel to try the prisoner.

If the process be in the king's bench, and the jury fill not, or be challenged off, that there are not enough to try the prisoner, there ought to issue a *distringas juratores*, and a command to return *tales*.

But if the whole jury be challenged off, then a new *venire facias*, and if none of the jury appear, then a *distringas juratores* shall issue, and no *tales*.

But if some of the jury appear, but not a full jury, [266] or if so many of them, that appear, are challenged off, that there remains not a full jury, a *distringas* shall issue with a *tales*.

If a full jury appear, and before they are sworn one of them die, so that there remains not a full jury, a *tales* shall be granted, and so it is, if one juryman dies after he be returned and sworn. 12 H. 4. 10. a. 20 E. 4. 11. b.

If a *tales* issue, and they do not appear full, or be challenged off, so that those that appear upon the principal pannel and *tales* make not up a full jury, another *tales* may be granted. 14 H. 7. 1. *b*.

In case of felony a *tales* may be granted of a greater number than the principal pannel in respect of challenges, so that there may be forty *tales* or more. 14 H. 7. 7. but if several succeeding *tales* be granted, the latter must be less in number than *that* which was next before, unless the array of the preceding *tales* be quashed, and then the number of the next may equal it. 20 H. 6. 40. *a*.

The times between the *teste* and return of, the *tales* must be (as it seems,) as in the principal *venire fac'*, *viz.* if the indictment be in a foreign county and removed into the king's bench, fifteen days, if in the same county, *de die in diem*.

If the indictment be before justices of *oyer* and *terminer*, the *tales*, as well as the principal pannel, ought to be by precept in the names of three of the justices, and may be made returnable *de die in diem*, or *de hord in horam* of the same day.

And as to all other matters they resemble the proceedings in the king's bench, *viz.* the number, the manner, and times of granting it, and so need not be repeated.

Before justices of gaol-delivery this learning of *tales* is not of much use, because there is no particular precept to the sheriff to return either jury or *tales*, but the general precept before the sessions and the award or command of the court upon the plea of the prisoner. 4 H. 5. *Enquest* 55. *Stamf. P. C. Lib.* III. *cap.* 6. *fol.* 155. *b*.

And yet, *vide Plow. Com.* 100. *a.* in *Salisbury's* case before justices of peace and gaol-delivery, a [267] *tales* granted returnable the next day. [1]

[1] The summoning, returning, attendance, qualifications, exemptions, &c. of jurors and of talesmen are now regulated in England by the statutes 6 Geo. IV. *ch.* 50. *ss.* 1, 2, 3, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 37, 39, 40, 41, 42, 43, 48, 49, 50; 7 Geo. IV. *ch.* 64, *s.* 21; 5 & 6 Will. IV. *c.* 76, *s.* 121; and 1 & 2 Vict. *c.* 4.

By the act of Congress of September 24, 1789, *ch.* 20, *s.* 29, it is enacted, That in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence. And jurors in all cases to serve in the courts of the United States shall be designated by lot or otherwise in each State respectively according to the mode of forming juries therein now practised, so far as the laws of the same shall render such designation practicable by the courts or marshals of the United States; and the jurors shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens, to serve in the highest courts of law of such State, and shall be returned as there shall be occasion for them, from such parts of the district from time to time as the court shall direct, so as shall be most favourable to an impartial trial, and so as not to incur an unnecessary expense,

or unduly to burthen the citizens of any part of the district with such services. And writs of *cevre facias* when directed by the court shall issue from the clerk's office, and shall be served and returned by the marshal in his proper person, or by his deputy, or in case the marshal or his deputy is not an indifferent person or is interested in the event of the cause, by such fit person as the court shall specially appoint for that purpose, to whom they shall administer an oath or affirmation that he will truly and impartially serve and return such writ. And when from challenges or otherwise there shall not be a jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court where such defect of jurors happen, return jurors *de talibus circumstantibus* sufficient to complete the pannel; and where the marshal or his deputy are disqualified as aforesaid, jurors may be returned by such disinterested persons as the court shall appoint.

It is provided by the act of July 20, 1840, *ch.* 47, That jurors to serve in the courts of the United States in each State respectively, shall have the like qualifications, and be entitled to the like exemptions, as jurors of the highest courts of law of such State now have and are entitled to, and shall hereafter from time to time have and be entitled to, and shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries now practised and hereafter to be practised therein, in so far as such mode may be practicable by the courts of the United States, or the officers thereof; and for this purpose, the said courts shall have power to make all necessary rules and regulations for conforming the designation and empannelling of juries, in substance, to the laws and usages now in force in such State; and further, shall have power, by rule or order, from time to time to conform the same to any change in these respects which may be hereafter adopted by the Legislatures of the respective States for the State courts.

The act of March 19, 1842, *ch.* 7. authorizes the judges of the courts of the United States in the State of Pennsylvania, to appoint one or more commissioners in the different cities and counties of the district in which their courts are held who shall have power to select from the taxable citizens residing within the limits of the said counties and cities, a number, to be designated by the judges, of sober, judicious, and intelligent persons, to serve as jurors in the said courts; and the said commissioners shall return the names by them selected to the marshal of the proper district; whereupon, the said courts shall, by due appointments, rules and regulations, conform the further designation and the empannelling of juries in substance to the laws and usages which may be in force in such State.

By the act of April 29, 1802, *ch.* 31, *s.* 30, the marshals for the several districts where circuit courts may be held (and not the clerks as formerly) are directed to return special juries.

Sect. 29, of the act of April 30, 1790, *ch.* 9, allows the prisoner in capital offences a copy of the indictment and list of the jury, &c. See *ante*, Vol. I. p. 341 *in nota*.

By the 4th *sect.* of the act of May 7, 1800, *ch.* 46, all artificers and workmen who are or shall be employed in the said armeries (of the United States) shall be exempted during their time of service, from all military service, and service as jurors in any court.

The provision in the judiciary act of September 24th, 1789, *ch.* 20, that, "in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve jurors, at least, shall be summoned from thence," is in force notwithstanding the amendment to the constitution of December 15th, 1796, requiring that the trial shall be had before "an impartial jury of the State and district wherein the crime shall have been committed." 1 *Burr's Tr.* 352.

It seems that it is not irregular for the marshal to summon a greater number of petit jurors than the *cevre* specifies. *U. S. v. Fries*, 3 *Dall.* 515.

The 29th section of the judiciary act is restricted to the mode of designating, and the qualifications of jurors; but it does not fix the number that are to be summoned, nor adopt any State rule for that purpose; it leaves it as at common law. *U. S. v. Insurgents*. 2 *Dall.* 341.

On several indictments for treason, in the circuit court for Pennsylvania district, a venire was issued in each case; the marshal returned a separate panel to each, containing thirty-six jurors from Philadelphia, fifteen from Delaware county, nine from Chester county, and twelve from the county where the treason was charged to have been committed; the general precept commanded the marshal to return at least forty-eight. The return was regular. *Id.*

The list of jurors furnished to the prisoner should specify the townships as well as counties where they reside; but there is no necessity that it designate their occupations. *Id.*

The statute of Indiana of 1824, excuses persons above sixty years of age, from serving on juries, if they choose to claim the privilege; but the party indicted cannot object to them on that ground. *State v. Miller, 2 Blackf. 35.*

Under the New Jersey act of 1797, which provides that jurors returned for the trial of issues shall be between the ages of twenty-one and sixty-five, and that a want of such qualification shall be good ground of challenge, provided the challenge be taken before the juror is sworn, it is not a ground for reversing a judgment, that one of the jurors before whom the cause was tried was above the age of sixty-five, it not appearing that any objection was made to him at the trial either by challenge or otherwise. *Sutton v. Petty, 2 South. 504.*

Where by statute, service as a juror renders one ineligible to serve again within three years, service as a juror in some court is intended; and a service on a sheriff's jury does not render the juror thus ineligible. *Brown v. Tyngsboro, 14 Pick. 196.*

A minister of the Methodist Episcopal church, who belongs to the "local connexion," and whose duty it is to preach when called upon to churches within a convenient distance from his residence, is a settled minister within the meaning of the Massachusetts statute of 1812, exempting settled ministers from serving as jurors. *Com. v. Buzzle, 16 Pick. 153.*

In Massachusetts, quakers are not exempted or disqualified by law from serving as grand jurors. *Com. v. Smith, 9 Mass. 107.*

A person who has served as a juror in the circuit court of the United States within three years, is not liable to be returned as a juror in the state courts. *Swan's case, 16 Mass. 220.*

One who has served on a grand jury within three years will be excused from serving as a traverse juror, although it is a little more than three years since he was drafted. *Ex parte Brown, 8 Pick. 504.*

The court will excuse one from the jury if he holds a public trust that cannot be deputed. *Contra*, if the trust is private, or if it can be deputed. *Piper's case, 2 Brown, 59.*

The exemption of postmasters from serving on juries, under the Act of Congress of 1825, c. 275, s. 35, is constitutional. *State v. Williams, 1 Dev. & Bat. 372.*

In Connecticut, it is not necessary to the qualifications of a jurymen, that his estate be actually rated, or put into the list. *State v. Doan, 2 Root, 451.* In the same state, judgment will be arrested, where it is discovered, after verdict, that one of the jury was not a freeholder. *State v. Babcock, 1 Conn. 401.*

In New York, jurors in a justice's court must be freeholders of the town where the cause is to be tried. *Streeter v. Hearsey, 11 Johns. 168.*

It is not necessary in South Carolina, that a juror should own a freehold; it is sufficient if he has paid a tax, the preceding year, of three shillings. *State v. Massey, 2 Hill, S. C. 379. State v. Williams, id. 381.*

Where jurors are challenged on the ground that they are not freeholders, the fact may be tried by the examination of the jurors themselves under oath. *Ogden v. Parks, 16 Johns. 180.*

Aliens, though freeholders and inhabitants of the town, are not qualified to serve as jurors in suits before justices of the peace, as they are not good and lawful men within the meaning of the New York act of sessions 24, c. 165, s. 12. *Borst v. Beecker, 6 Johns. 332.*

In Pennsylvania, alienage is, it seems, a good cause of challenge, but it cannot

be taken advantage of after verdict. *Hollingsworth v. Duane*, 4 Dall. 353. See *Judson v. Esala, Minor*, 2.

In a capital case, the names of the original panel should be put in and drawn before those of the talesmen. *State v. Benton*, 2 Dev. & Bat. 196.

In organizing a jury for the trial of a prisoner, the jurors of the first and second juries are to be called in succession, beginning with the foreman; it is not until both the regular juries are exhausted, that the supernumeraries in the panel annexed to the *venire* are to be drawn. *State v. Sims*, 2 Bailey, 29. *State v. Crank*, id. 66.

In drawing a jury under the statute (1 R. L. 331, s. 20,) if a jury does not appear when drawn and his name called, he may be refused a place in the box, though before a full jury is drawn, he appears and answers. *People v. Vermilyon*, 7 Cow. 369.

If the jury are not drawn by the sheriff and county commissioners, so that the prisoners can be tried at the first court, they will be entitled to a discharge unless tried at the next session. *Com. v. Prophet*, 1 Browne, 135.

Where A. was chosen a juror and his name put into the box and drawn from it, but by mistake of the sheriff, B. was summoned, and the mistake being discovered, B. was dismissed, and A. summoned; it was held that A. was a competent juror. *Colt v. Eves*, 12 Conn. 243.

Where a city charter required that a certain number of jurors should be chosen on the first Monday of July and they were not chosen until the 8th of August, it was held that this provision was directory, and that a jury, empanelled from the jurors so chosen, was a legal jury. *Id.* See *Cole v. Perry*, 6 Cow. 584.

If a juror be struck from the list by the defendant, and then sworn with the knowledge of the defendant, the court will not award a new trial. *Jordan v. Meredith*, 1 Binn. 27.

Objections to an officer returning a jury should be taken before the trial commences, and cannot be taken advantage of in arrest of judgment. *Samuels v. State*, 3 Miss. 68.

After a plea of the general issue, no objection reaching the *venire facias* can be made, and therefore the want of one is not error. *State v. Williams*, 3 Stew. 454.

After verdict, in criminal cases, it is presumable that the names of the jurors specified in the *venire facias* have been drawn according to law, particularly when the writ expresses that they were "good and lawful jurors duly appointed as the statute requires." *Id.*

Where the *venire* was directed to any one of the coroners, &c. without any suggestion that the sheriff was exceptionable, it was held a fatal defect, and not cured by verdict. *Hugg v. Kille*, 2 Halst. 435.

Where a sheriff or other officer, is authorized to select and summon a jury, he cannot, after summoning a person to serve as a juror, discharge him from attendance, and summon another in his stead; after the juror is summoned, the court only can discharge him. *Brooklyn v. Patchen*, 8 Wend. 47; 1 Browne, 121; *Bayles v. McEwen*, 2 Penning. 643.

A *venire facias* directed to a sheriff in Tennessee, to summon a jury, returnable to a circuit court, is not void because it issued without the seal of the court. *Bennett v. Tennessee*, Mart. & Yarg. 133; see *Johnson v. Cole*, 1 Penn. 266; *People v. McKay*, 18 Johns. 212, *contra*.

Under the present mode of drawing and summoning juries in New York, no defects or irregularities in the *venire* will affect the judgment or the proceedings at the trial. *Haight v. Holley*, 3 Wend. 258.

The qualifications of jurors required by statute ought to be stated in the *venire*. *Barton v. Murry*, 1 Penn. 97; see *Sharpe v. Hendrickson*, 2 id. 685; *Cox v. Haines*, id. 687.

If the jury cannot be formed from the original panel, nor from the bystanders, the court may award a *venire facias* commanding the sheriff to summon a specified number to attend the court then in session; and upon a return of the process the prisoner may be compelled to elect a jury, saving his right of challenge. Such

process may be awarded on the report of the sheriff that there are no other bystanders, nor will the court hear proof afterwards that there were other qualified bystanders who were not called. *Gibson v. Com.* 2 *Virg. Cas.* 111.

A court of special sessions have authority to issue a second *venire* for a jury to try the defendant, if the first jury are discharged because they cannot agree on a verdict. *Vandewerker v. People*, 5 *Wend.* 530.

A *venire* for a petit jury should not contain a panel for a grand jury also. They are distinct bodies, and should be separately summoned. *Forsythe v. State*, 6 *Harm.* 19.

It is not necessary that a *venire facias* should issue to the sheriff to summon a jury before he can proceed to do so, nor need one be awarded on the roll. *Samuel v. State*, 3 *Mis.* 68.

In New Jersey, if one of the jurors' names is omitted in the copy of the panel delivered to the prisoner, the juror cannot be sworn. *State v. Powell*, 2 *Halst.* 244.

If a juror be wrongly named in the panel, he cannot be sworn. *U.S. v. Wilson*, 1 *Bald.* 78.

Where the sheriff annexes the panel to the *venire*, and not to the *distringas*, the latter may be amended. *Hill v. Hill*, *Coxe*, 261.

Where a *venire facias* directed to the constable to cause a juror to be drawn, not more than twenty nor less than six days before the sitting of the court, and he made return that the juror was drawn "as above directed," but without date, the return was held sufficient. *Fellow's case*, 5 *Greenl.* 333; see *State v. Williams*, 3 *Stew.* 454.

Where the constable had omitted to insert the name of the juror in his return, the juror was put upon the panel on his making oath that he had been summoned. *Paterson's case*, 6 *Mass.* 486. So where it did not appear, by the constable's return on the *venire*, at what time he summoned the jurors, they were put upon the panel upon making oath that they had received due notice. *Anon.* 1 *Pick.* 196.

Talesmen may be drawn in criminal as well as civil cases. *State v. Williams*, 2 *Hill, S. C.* 381.

In Maryland where nine jurors are sworn in a criminal case, and the rest of the original panel is exhausted by peremptory challenges, the court can legally award an order for the summoning of only three talesmen, and where eleven are sworn, to summon only one. *Burk v. State*, 2 *Har. & J.* 426.

If there be a total default of jurors on the return of the *venire*, a new one must issue; but if any number, however small, appear, and they be set aside on challenge, twelve talesmen may be sworn, to try the issue. *Fuller v. State*, 1 *Blackf.* 63.

The court may order a tales though the jury is special, and summoned from a remote county. *Lee v. Ewaul*, *Coxe*, 233; *Ailee v. Shaw*, 4 *Yeates*, 236.

It is irregular for talesmen to serve in any cause as jurors except that for which they were specially returned; but if the objection be not made before verdict, it will furnish no ground for a new trial. *Hovland v. Gifford*, 1 *Pick.* 43, n.

In South Carolina, the act of 1769 designates those who may be talesmen; and if at the time a tales juror is drawn and presented to the prisoner, he is legally qualified, he is entitled to be sworn. *State v. Williams*, 2 *Hill, S. C.* 381. Where the panel of the *venire* is exhausted, and the jury not formed, talesmen must be drawn; each one as he is drawn, must be called and presented; if he does not appear when called, another is to be called and presented, and so on until the jury is filled. It is too late to make any objection to talesmen after they are sworn. *Id.* The court has no authority to issue a *venire facias* for talesmen. *Id.*

A *circumstantibus* can be taken from those only who are actually present in court. *Simon v. Grutz*, 2 *Penn.* 412; see generally, 1 *Chit. C. L.* 506; 3 *Burn's J.* 938.

CHAPTER XXXV.

CONCERNING CHALLENGES, AND FIRST, OF PEREMPTORY CHALLENGES.

CHALLENGES in respect of the parties taking them are of two kinds. 1. Challenges by the prisoner. 2. Challenges by the king.

Challenges by the prisoner are of two kinds. 1. Without cause shewn, which are commonly called peremptory challenges. 2. With cause shewn, which again are of two sorts. 1. Of the array. 2. To the poll.

In this chapter I shall consider peremptory challenges what they are, and what is to be done upon them.

By the common law, if a man were outlawed of felony or treason, and brought a writ of error upon the outlawry, and assigned some error in fact, whereupon issue was joined, he should not challenge peremptorily or without cause. *Stamf. P. C. Lib. II. cap. 7. fol. 158. a.*

The like law seems to be, if he had pleaded any foreign plea in bar or in abatement, which went not to the trial of the felony, but of some collateral matter only.

But if a man be indicted or appealed of treason or felony, and plead *not guilty*, or plead any other matter of fact triable by the same jury, and plead over to the felony, because his life is now at stake he might challenge peremptorily and without cause any jurors under the number of three whole [268] juries, namely thirty-five of the jurors returned, and they are to be withdrawn out of the pannel; and this was *in favorem vitæ*, *Moore 12.*

And if twenty men were indicted for the same offense, tho by one indictment, yet every prisoner should be allowed his peremptory challenge of thirty-five persons. *9 E. 4. 27. b.*

And if there were but one *venire fac'* awarded to try them, the persons challenged by any one should be withdrawn against them all. *9 E. 4. 27. Plow. Com. 100. Salis-bury's case.*

But if he had peremptorily challenged above thirty-five persons, and insisted upon it, and would not leave his challenge, then in case of an indictment of high treason, it amounted to *nihil dicit*, and judgment of death should be given against him.

But in case of petit treason or felony the prisoner was an-

tiently put to *peine fort & dure*, as declining the trial by law appointed, the consequence whereof was only the forfeiture of of his goods, but it amounted to no attainder, and consequently no escheat of his lands; *vide* 14 *E.* 4. 7. *a.* *Plow. Com.* 262. *b.* and thus the practice was until the beginning of *H.* 7. *vide* 17 *Assiz.* 6. 17 *E.* 3. 23. *a.*

But afterwards by the advice of all the judges of both benches it was resolved, that the party so peremptorily challenging above thirty-five should have judgment of death, and it amounted to an attainder, 3 *H.* 7. 12. *a.* *Co. P. C.* 227, 228, for having pleaded to the felony, and put himself upon the country here could be no standing mute, and therefore the judges resolved on this course, as most consonant to law, to be practised in all circuits. 3 *H.* 7. 12. *a.*

But for all this the better opinion of latter times, as well as of former is, that the judgment in case of such a peremptory challenge of above thirty-five at the common law before 22 *H.* 8. in case of felony was not an attainder but only penance according to the resolution of the judges in the time of *E.* 4. mentioned by *Hussey* 3 *H.* 7. 12. *a.* *Stamf. P. C. Lib.* II. *cap.* 61. *fol.* 150. *b.* *Stamf. prærogat.* 46. *a.* *Plow. Com.* 262. *b.* *per Weston.*

And in this case the jury it seems was not to be sworn, but the judgment was given singly upon his [269] peremptory challenge.

And yet, if a prisoner plead *not guilty*, and put himself upon the country, and the prisoner challenge peremptorily under three juries, *viz.* thirty-five, whereby the jury remains, and a *tales* is granted, and the jury appears, and the prisoner then stands mute, yet the jury shall pass upon him upon his plea of *not guilty*, which he had before pleaded. 15 *E.* 4. 33. *b.*

But by the statute of 22 *H.* 8. *cap.* 14. it is enacted, "That no person arraigned for petit treason, murder, or felony be admitted to any peremptory challenge above the number of twenty, this act was continued until 32 *H.* 8. *cap.* 3. and then made perpetual."

By the statute of 33 *H.* 8. *cap.* 23. it is enacted, "That in cases of high treason, or misprision of treason, peremptory challenge shall not be allowed."

But notwithstanding these statutes, by the statute of 1 & 2 *P. & M.* *cap.* 10. enacting, "That all trials for *any* treason shall be according to the due order and course of the common law," peremptory challenge of thirty-five or under, is, at this day, allowable in cases of high treason and petit treason. *Co. P. C.* 227. *Stamf. P. C. Lib.* 3. *cap.* 7. *fol.* 158. *a.*

And consequently all the consequences thereof, namely the attainder of the prisoner, that peremptorily challengeth above

thirty-five in an indictment of high treason or petit treason, stand as at common law.

But as to all murders and other felonies the statute of 22 *H.* 8. *cap.* 14. taking away the peremptory challenge of above twenty stands in force. *Co. P. C.* 227, 228.

But then suppose the prisoner in case of felony peremptorily challenges above twenty, what shall be done? shall judgment of death be given, as where he challenged above thirty-five at common law? And it should seem, by the opinion of former times, it should.

For the several statutes, that oust clergy in case of [270] challenging above twenty, import, that by such challenge the party should be convict, otherwise clergy were needless to be ousted upon such challenge, as 25 *H.* 8. *cap.* 3. *vide* 11 *Co. Rep.* *Poulter's* case 30 *b.* 4 & 5 *P. & M.* *cap.* 4.

But yet, if he challenge above twenty, as the law stands at this day, he shall not have judgment of death, but only his challenge shall be over-ruled, and the jurors sworn for two reasons. 1. Because the statute hath made no provision to attain the felon, if he challenge above the number of twenty. 2. Because the words of the statute of 22 *H.* 8. are, *That he be not admitted to challenge above the number of twenty*, so that, if he challenge above twenty peremptorily, his challenge shall be only disallowd. *Co. P. C. cap.* 102. *p.* 227, 228.

If *A.* be indicted and plead *not guilty*, the jury appears, he challenges six of the jury for cause, and the causes found insufficient, and the six are sworn, and the rest of the jury challenged off, whereby the inquest remains *pro defectu juratorum*, a *tales* granted and the jury appear, the prisoner may challenge peremptorily any of the six, that were before challenged for cause, allowd, and sworn 32 *H.* 6. 26. *b.* 14 *H.* 7. 19. *a.* for it is possible a new cause of challenge may intervene after the former swearing. 2 *R.* 3. 13. *a.* but if a man challenge him for cause, he must shew a cause happened after the former swearing.

But if the prisoner upon the first pannel had challenged for instance fifteen peremptorily, and then the jury remains for default of jurors, and a *distringas* with a forty *tales* is granted, he shall challenge peremptorily no more than will fill up his number, *viz.* in case of felony at this day five more, and in case of treason or petit treason twenty more to make up his full number of twenty peremptory challenges in the first case, and thirty-five in the last.

CHAPTER XXXVI.

CONCERNING CHALLENGES FOR CAUSE, IN CASE OF INDICTMENTS FOR TREASON OR FELONY.

CHALLENGES for cause upon indictments are of two kinds, either for the king, or for the prisoner, and each of these are again of two kinds, either to the array, or to the poll.

The king may challenge the array or the poll. 4 *H.* 7. 3. *b.* *Stat.* 33. *E.* 1. *Ordinatio de inquisitionibus*, but then he must shew cause of challenge, but he need not shew the cause upon his challenge to the poll, till the whole pannel be perused. *Stamf. P. C. Lib.* III. *cap.* 7. *fol.* 162. *b.*

Challenges by the prisoner for cause shewn are of two kinds, *viz.* Either to the array or to the poll, but it is no principal challenge either to the array or poll, that the sheriff or juror is of the king's livery, but he must conclude to the favour. 3 *H.* 6. *Challenge* 17.

If an alien be indicted or appealed of felony, tho the indictment ought to be by a grand inquest of *English*, yet by the statute of 28 *E.* 3. *cap.* 13. the trial shall be *per medietatem linguæ*, *viz.* half the jury to be of aliens, except in case of felony by *Egyptians*, within the statute of 1 & 2 *P. & M.* *cap.* 4.

And this statute extends to felonies, as well made after the statute of 28 *E.* 3. as before, for the statute is general *all manner of inquests*.

And this statute extended to trial of aliens indicted of treason also, and so the law stood till 1 & 2 *P. & M.* *cap.* 10. which restored the common-law trial in treason, and consequently ousted *medietas linguæ*. 1 *Mar. Dy.* 145. *a.* *Shirley's case.* *Co. P. C. p.* 27.

If upon an indictment of felony against an alien he plead *not guilty*, and a common jury be returned, if [272] he doth not surmise his being an alien before any of the jury sworn, he hath lost that advantage, *Dy.* 304. *a.* but if he alledge, that he is an alien, he may challenge the array for that cause, and thereupon a new precept or *venire facias* shall issue, or an award be made of a jury *de medietate linguæ*. 21 *H.* 7. 32. *b.* but it is more proper for him to surmise it upon his plea pleaded, and thereupon to pray it.

It seems, that upon indictments of treason or felonies, the prisoner pleading *not guilty* there ought at common law to be four hundreders returned: *vide Sat.* 33 *H.* 8. *cap.* 23. that ousted

challenge for shire or hundred in cases of treason, but that statute as to treason was altered by 1 & 2 P. & M. cap. 10.

But the statute of 35 H. 8. cap. 6. requiring six hundreders, and that of 27 Eliz. cap. 6. requiring only two hundreders in personal actions extend not to trials upon indictments of treason or felony.

Yet I never knew any challenge for default of hundreders upon a trial of an indictment for felony or treason.

Challenges to the poll for cause are many, as in other cases, which I shall not mention at large, because they are all gathered up by my lord *Coke super Lit.* § 234. but shall only mention such, as more specially belong to capital causes.

By the statute of 33 H. 8. cap. 12. for treason or felony committed in the king's house and tried before the lord steward all challenge except for malice is taken away. By the statute of 25 E. 3. cap. 3. it is enacted, "That no indicter be put in inquest against the party indicted, if he be challenged for that cause."

By the statute of 2 H. 5. cap. 3. no man is to be admitted in any inquest upon the trial of the death of a man, (a) unless he

(a) That is to say in capital causes: This statute was introductive of a new law only with respect to the *quantum* of the freehold, for by the *common law* it was requisite that a juror should be a freeholder, so that, tho this statute be repealed by the general words of 1 & 2 P. & M. cap. 10. as to treason, yet some freehold was still necessary, and so it was allowd in *Fitzharris's* case by *Pemberton*, C. J. See *Stat. Tr.* Vol. III. p. 263. notwithstanding it was ruled otherwise in the case of lord *Russel* by the same judge, *Stat. Tr.* Vol. III. p. 634. and in the case of Col. *Sydney*. *Ibid.* p. 736. which last resolutions were declared to be illegal by several acts of parliament. See 1 W. & M. Sess. 2. cap. 2. 7 W. 3. cap. 3. See also Sir *John Hawles's* remarks on those trials. *Stat. Tr.* Vol. IV. p. 169. & p. 189. By 4 & 5 W. & M. cap. 24. continued by 10 Ann. cap. 14. & 9 Geo. I. cap. 8. 'tis not sufficient, that a juror be a freeholder, but he must also have within the same county freehold or copyhold lands to the clear yearly value of ten pounds, and tho this statute seems principally to regard counties at large, yet it hath been allowd to extend to trials in *London* for high treason. *Francis's* case. *Stat. Tr.* Vol. VI. p. 58. and *Laver's* case, *Stat. Tr.* Vol. VI. p. 245. See the statutes of 3 Geo. 2. cap. 25. & 4 Geo. 2. cap. 7. made perpetual by 6 Geo. cap. 37. whereby it is provided, "That all leaseholders upon leases for the term of 500 years or more, or for 99 years, or any other term determinable upon one or more lives of an estate in possession in land in their own right of the yearly value of twenty pounds or upwards over and above the reserved rent payable thereout, (or in the county of *Middlesex* upon any leases, where the improved rents or value amount to fifty pounds or upwards *per manum* over and above all ground rents or other reservations) may be summoned or impannelled to serve on juries in like manner as freeholders, &c. And that the sheriffs of *London* shall not impanel or return any person to try any issue in the *King's-bench*, *Common Pleas*, and *Exchequer*, or to serve on any jury at the sessions of *oyer* and *terminer*, *gaol-delivery*, or sessions of the peace, but such who shall be an householder within the said city, and have real or personal estate to the value of one hundred pounds, and that no person shall be impannelled or returned to serve on any jury for the trial of any capital offense, who shall not be qualified to serve as a juror in civil causes; and the same matter and cause alleged by way of challenge and so found shall be admitted as a principal challenge, and the person so challenged may be examined on oath as to the truth of the said matter."

have lands or tenements of the value of 40s. *per ann.* above all charges, if he be challenged: And by the construction of this statute, 1. It must be land of that value in the same county. 9 *H.* 7. 1. *b.* Again 2. He must not only be seised thereof at the time of the pannel made, but also at the time that he comes to be sworn, otherwise he may be challenged. 12 *H.* 7. 4. *a.*

And altho the statute of 27 *Eliz.* *cap.* 6. hath raised it to 4l. *per annum*, yet that extends only to issues joined in the king's bench, common pleas, exchequer, and justices of assise, so that it reacheth not to trials of felons before justices of gaol-delivery, *oyer* and *terminer*, or of the peace, but these trials stand as they did by the statute of 2 *H.* 5. as to the value of jurors, *vide stat.* 33 *H.* 8. *cap.* 23.

But yet by some subsequent statutes the value of jurors freehold in cases of trial of felony is changed.

By the statute of 8 *H.* 6. *cap.* ultimo upon a trial *per medietatem linguæ* aliens need not have 40s. *per* [274] *ann.* so *defectus annui census* is no challenge as to the aliens, but still it remains a good challenge as to the other half of the jury, that are denizens. *Stamf. P. C. fol.* 160. *b.*

By the statute of 23 *H.* 8. *cap.* 13. upon trials of felony or murder in cities or boroughs a citizen or burgher worth 40l. personal estate may pass, tho he have no freehold, but knights or esquires living there are not within this provision.

The statute of 33 *H.* 6. *cap.* 2. concerning indictments of persons living in *Lancashire* refers not to trials.

By the statute of 11 *H.* 6. *cap.* 1. a challenge is allowd of any person living in the stews of *Southwark*, tho he be of sufficient freehold.

When a prisoner challengeth for cause he ought to shew his cause presently (*b*) because it is the king's suit, 1 *H.* 5. 10. *b.* 38 *Assiz.* 22. (*c*) but some books are, that he shall not shew cause till the pannel be perused 6 *R.* 2 *Challenge* 105. but he must shew all his causes together *per* 24 *Eliz.* *C. B.* *Bracket's* case.

If in a trial upon an indictment of felony eleven be sworn, and the twelfth challenged, whereby the inquest remains for default of jurors, and a *distringas* with a *tales* issue, and the jurors appear, ruled 1. The king shall not challenge any of the eleven sworn, unless it be for a cause happened since their swearing; if it happen before, tho not known till after, it shall not be allowd. 2. That the eleven, that were last sworn, shall not be now first sworn, but they shall be called, as they happen in the pannel. *M.* 43 & 44 *Eliz.* *B. R.* *Wharton's* case, *Yelv.* 23.

(b) *Mo.* 846. *Luke* and *Clerk.*

(c) See *Challenge* 128

And the same law is for the challenge of the prisoner for cause, but he may challenge them peremptorily notwithstanding they were formerly sworn, as before is shewn, *p.* 270.

Touching the trial of a challenge for cause made to the poll, *vide Co. Lit. p.* 158. *a.* If a juror be challenged before [275] any jury sworn, two triers shall be appointed by the court, and if he be found indifferent and sworn, he and the two triers shall try the next challenge, and if he be tried indifferent, then the two first triers shall be discharged, and the two jurors tried indifferent shall try the rest.

If the plaintiff challenge ten and the prisoner one, then he that remains shall have added to him one chosen by the plaintiff, and another by the prisoner, and they three shall try the challenge. If six be sworn, and the rest challenged the court may assign any two of the six sworn to try the challenges.

If the array be challenged, it lies in the discretion of the court how it shall be tried, sometimes it is done by two attornies, sometimes by the two coroners, and sometimes by two of the jury with this difference, that if the challenge be for kindred in the sheriff, it is most fit to be tried by two of the jurors returned; if the challenge found in favour of partiality, then by any other two assigned thereunto by the court. 29 *Eliz. C. B. Lester's case, Trin. 21 Jac. B. R. Loyd and Williams. (e)*

But all this learning touching challenges to the poll, whether peremptory or for cause, is intended of trials by ordinary juries, not of trial by peers, for there no challenges is allowable, for they are not only triers of the fact but in some respects judges. *P. 7 Car. 1. Cusus comitis* Castle-haven, *(f)* but of this more hereafter. [1]

(e) 2 *Rel. Rep.* 363.

(f) *State Tr. Vol. I. p.* 366.

[1] There are two kinds of challenge; either to the *array*, or to the *polls*. Challenge to the array is in respect to the partiality or default of the sheriff, or other officer who made the return; and this is two-fold. 1. *Principal challenge to the array*, which if it be made good is a sufficient cause of exemption, without leaving any thing to the judgment of the triers. Some of the causes of challenge of this sort, are as follows; if the sheriff be the actual prosecutor of the party aggrieved, the array may be challenged, though no objection can be taken in arrest of judgment. 1 *Leach*, 101; 4 *B. & A.* 471. And if the sheriff be of actual affinity to either party, and the relationship be existing at the time of the return. *Co. Litt.* 156, *a.* See *Vanauker v. Beemer*, 1 *South.* 364; *Munshower v. Patton*, 10 *S. & R.* 334; if he return any person at the request of the prosecutor or the defendant, *Bac. Abr. Juries, E.* 1; or any person whom he believes to be more favorable to one side than the other; *id.* if an action of battery be depending between the sheriff and the defendant, or if the latter have an action of debt against the former, *id.* So if the sheriff, or his bailiff, who makes the return, is under the distress of the party indicting or indicted, or has any pecuniary interest in the event, or is counsel, attorney, or servant, or arbitrator in the same cause, *id.* And so the

default of the sheriff is sometimes a ground for this sort of challenge. *Co. Litt.* 156, a. See *Gardiner v. Turner*, 9 *Johns*, 261; *Pringle v. Huse*, 1 *Cow.* 435; *R. v. O'Connell*, 11 *Cl. & Finn.* 15; 9 *Jurist* 30. And in all cases where there is a manifest partiality it will be sufficient to quash the array. In Pennsylvania it is no cause of challenge to the array that the sheriff was not present the whole time, during which the selection of jurors was made. *Com. v. Lippard*, 6 *S. & R.* 395. See *Crane v. Dygert*, 4 *Wend.* 675; *People v. Jewett*, 3 *id.* 314. The person challenging the array must be prepared to prove the cause, and if he omit to challenge, he cannot take advantage of the alleged defect afterwards. *R. v. Savage*, *R. & M. C. C.* 51; *R. v. Sutton*, 8 *B. & C.* 417, 2 *M. & R.* 406. The prosecutor has a right to this challenge as well as the defendant.

2. *Challenge to the array for favor.* This being no principal challenge, must be left to the discretion and conscience of the triers. 3 *Burn*, 963. As if the plaintiff or defendant be tenant to the sheriff, this is no principal challenge, but he may challenge for favor, and leave it to trial. So affinity between the son of the sheriff and the daughter of the party, and the like, is a challenge to the favor; but if the sheriff marry the daughter of either party, or the like, this is a principal challenge. 1 *Inst.* 156.

Challenge to the polls, which is three-fold. 1, *Peremptory*.—This is so called, because a person may challenge peremptorily, upon his own dislike, without showing any cause, 3 *Burn*, 964. The king shall not in any case have this peremptory challenge. *R. v. Frost*, 9 *C. & P.* 136. But the crown is not compelled to show its cause of challenge until the panel is gone through, so that it may appear that there will not be sufficient to try the prisoner, if the peremptory objection is permitted to prevail. 1 *Ventr.* 509; *Sir Thomas Raym.* 473; *Skin.* 82; 2 *St. Tr.* 744; 3 *id.* 52, 869; 2 *Hawk. c.* 43. s. 3; *R. v. Parry*, 7 *C. & P.* 836. The same practice prevails in the federal and some of the state courts. *U. S. v. Wilson*, 1 *Baldwin*, 81; *State v. Arthur*, 2 *Dev.* 217; *State v. Stulmaker* 2 *Brev.* 1; *Com. v. Joliffe*, 7 *Watts*, 585; *Roberts' Dig.* 328. See *State v. Benton*, 2 *Dev. & Bat.* 196. In treason, the prisoner may challenge thirty-five jurors at common law; by the 6 *Geo. IV. c.* 50. s. 29, no person arraigned for murder or felony shall be admitted to any peremptory challenge above the number of twenty. By the Act of Congress of 30 April 1790, c. 9. s. 30, if any person or persons be indicted of treason against the United States and shall stand mute, &c. or shall challenge peremptorily above the number of thirty-five of the jury; or if any person or persons be indicted of any other offence, for which the punishment is declared to be death, if he or they shall also stand mute, &c. or challenge peremptorily above the number of twenty persons of the jury, the court, in any of the cases aforesaid, shall notwithstanding proceed to the trial of the person or persons so standing mute or challenging, as if he or they had pleaded not guilty, and render judgment accordingly thereon. Peremptory challenge is not allowed in the trial of collateral issues, *Fost.* 42; nor in a trial for a misdemeanor, *Reading's case*, 7 *Hov. St. Tr.* 265; *Titus Oates' case*, 10 *id.* 1079. If several prisoners are jointly indicted, and join in their challenges, they can only challenge the limited number of the whole; but if they are tried separately, then each of them may challenge the whole number. *R. v. Charwick*, *Salk.* 81. A prisoner, in a case of felony, having challenged twenty jurors peremptorily, cannot withdraw one of those challenges to challenge another juror, instead of the one that he had previously challenged. *R. v. Parry*, 7 *C. & P.* 836. In case of felony, after twenty peremptory challenges, the prisoner may still examine any other of the jurors who are subsequently called as to the qualification. *R. v. Leach*, 9 *id.* 499. The right of peremptory challenge is a right not to select, but to reject. *U. S. v. Marchant*, 4 *Mason* 160; 12 *Wheat.* 480; *State v. Smith*, 2 *Iredell*, 402; but see *People v. Bodine*, 1 *Denio*, 281.

2. *Principal challenge to the polls*, is where cause is shown, but which if found true, stands sufficient of itself, without leaving any thing to the triers. It has been allowed a good cause of challenge on the part of the prisoner, that the juror has declared his opinion beforehand, that the party is guilty, or will be hanged, or the like. 2 *Hawk. c.* 43. s. 28. But expressions used by a jurymen previous to the trial are not a cause of challenge, unless they can be referred to something of

personal ill-will towards the party challenging. *R. v. Edwards*, 4 B. & Ald. 492. In Burr's trial, on the question of what should be considered such a pre-judging of the cause as to disqualify a juror from sitting, C. J. Marshall says, "The object of it is, that the jury should be perfectly impartial. Now can it be said to be impartial whilst the juror has declared his opinion that the prisoner is guilty or innocent, that he ought to be punished or that he ought not? If a juror has made his declaration upon part of the testimony it is so much the worse, because he must be supposed to have declared upon it without the facts, he having decided without his legal knowledge of the testimony. He is therefore peculiarly unfit for a juror. The question to suit such a case would be 'have you formed or delivered an opinion on the case?' Every man has received impressions, but those impressions if they are not strong might not disqualify him. A man for instance might think that he is actionable, might think that he is wrong or that he is not. It might not extend to the merits and full nature of the case for which the prisoner stands indicted, if it does not the person might be said to be fair, because his mind is free to receive further impressions. The question should therefore ascertain, whether he has any opinion formed or not on the case as it is. Every man may have formed an opinion as to the treasonable nature of certain acts; but it is the application of that treason to the individual that makes the opinions of the juror objectionable." Again, "the general principle of law is, that a juror whose mind is prepared to go upon the case to receive his convictions of the guilt or innocence of the accused from the testimony, and that only, is the only proper person to be called an impartial juror. This is the general view which courts have had with respect to qualifications, that where a man has formed and expressed an opinion upon the case itself, upon a view of the whole case, he is not esteemed an impartial juror. But when a man has formed an opinion upon only part of a case, from testimony such as he has seen or heard, or when the impression made is extremely light, it merits a different treatment." Where there were separate trials on a joint indictment it was held good cause of challenge on the second trial, that a juror said that if the same evidence was to be adduced as on the former trial, the prisoner is guilty. *U. S. v. Wilson*, 1 Bald. 78. A juror having said upon the *voir dire*, that he had formed an opinion from what he had heard, but that he did not know how much he might be influenced by it, was allowed to be challenged for cause. *Com. v. Knapp*, 9 Pick. 496. A juror, however, cannot be asked whether he considers the facts set forth in the indictment to constitute a proper subject for punishment. *Com. v. Burrell*, 16 id. 153; see *People v. Marvin*, 4 Wend. 229; *People v. Bodina*, 1 Denio, 281; *Blake v. Millsborough*, 1 Johns. 316; *Pringle v. Huse*, 1 Cow. 432; *People v. Mather*, 4 Wend. 22; *ex parte Vermilyen*, 6 Cow. 553; *People v. Rathbun*, 21 Wend. 509; *Armstead v. Com.* 11 Leigh, 657; *Heath v. Com.* 1 Robin. 735; *Irvine v. Kean*, 14 S. & R. 292; *State v. Bonwell*, 2 Herrington, 529; *Brown v. Com.* 11 Leigh, 769; *Osander v. Com.* 3 id. 780; *Sprowel v. Com.* 2 Virg. Ca. 375; *Pollard v. Com.* 5 Rand. 659; *Hendrick v. Com.* 5 Leigh, 708; *Lithgow v. Com.* 2 Virg. Ca. 297; *State v. Williams*, 3 Stew. 454; *Queensberry v. State*, 3 Stew. & Port. 306; *State v. Johnson*, 1 Walk. 392; *State v. Hoover*, id. 318; *King v. State*, 5 How. Miss. R. 730; *Howerton v. State*, Meigs, 262; *McGregg v. State*, 4 Blackf. 106; *Smith v. Eames*, 3 Scam. 73; *Gardiner v. People*, id. 68; *Sellers v. People*, id. 414.

A juror is bound to answer under oath, any questions asked him with regard to his competency as a juror, providing such questions do not tend to degrade him or make him infamous. *Edward's Jurymen's Guide*, 85. A challenge of a juror because of his having formed and expressed an opinion on the question to be tried, can be made only by the party against whom it was so formed and expressed. *State v. Benton*, 2 Dev. & Bal. 196. For other instances of principal challenge to the polls, see 3 Burn, 965.

3. *Challenge to the polls for favor*, takes place when either party cannot take any principal challenge, but shows cause of favour, which must be left to the conscience and discretion of the triers, upon hearing their evidence, to find him favorable or not favorable. And the causes of favor are infinite. The rule of law is, that he must stand indifferent, as he stands unsworn. 1 Inst. 157. See generally, 2 Hawk. c. 43; *Bac. Abr. Juries. E.*; *Com. Dig. Challenge*; 4 Bl. Com. 352; 1 Chit. C. L. 533; *Whart. C. L.* 600; 3 Burn's J. 962.

CHAPTER XXXVII.

CONCERNING EVIDENCE AND WITNESSES.

HAVING gone through those things, that are previous and preparatory to the trial, I come now to consider the trial itself by jury, and the things concomitant with it, and first concerning the evidence to be given to prove the prisoner guilty.

To give a full account of evidence of this kind there will be these things examinable. 1. The quality and qualifications of witnesses. 2. The manner of their testimony, what upon oath, and what without oath. 3. Those evidences and examinations, that are in writing, what, and when allowable, and what not. 4. The things testified, and therein of presumptions and presumptive evidences by the common law, and by acts of parliament. 5. What variance between the evidence and indictment maintains the indictment.

I. Concerning the quality and competency of witnesses to be produced.

It is to be observed, that there be many circumstances that disable a juror or are sufficient causes of exceptions or challenges of him, that are not allowable exceptions against a witness.

The exception of kindred is a good cause of challenge against a juror, but not against a witness, therefore the father may be a competent witness for or against his son, or *è converso*, the master for his servant or *è converso*. These and the like exceptions may be to the credit or credibility of a witness, but are not exceptions against his competency.[1]

[1] The credibility of a witness is compounded of his knowledge of the facts he testifies—his disinterestedness—his integrity—his veracity—and his being bound to speak the truth, by such an oath as he deems obligatory. Proportioned to these, is the degree of credit his testimony deserves from the court and jury.

From their Knowledge.—Although a witness be perfectly disinterested, although he be a man of integrity and veracity, and have a just sense of the moral obligation of the oath he has taken, still the degree of credit to be given to his testimony depends upon his real knowledge of the facts he testifies. A man may be deceived in a fact, from deriving his knowledge of it through a false medium; from his attention being occupied more by the circumstances accompanying it than by the fact itself, at the time of its occurrence; or from a thousand other circumstances, which, if candidly stated, might be satisfactorily answered and accounted for by the other party, so as to convince the witness himself that he laboured under a mistake. Where there is a doubt, therefore, whether the evidence given by a witness be not founded in some misconception, it is the duty of the counsel who cross-examines him, to question him as to the sources of his knowledge; his reasons for believing the fact to be as he has

For that I may observe it once for all, the exceptions to a witness are of two kinds. 1. Exceptions to the credit of the witness, which do not at all disable him from being [277] sworn, but yet may blemish the credibility of his testi-

stated; his reasons for recollecting it; the circumstances attending its occurrence; whether it was light or dark, and whether he was near or distant, at the time it occurred, and the like; so that the jury may be able to judge of the degree of confidence they should place in the witness's testimony. If a witness refuse to answer such questions, or do not answer them satisfactorily, it should have the effect of detracting considerably from his credit in the estimation of the jury.

From their Disinterestedness.—A witness, to be perfectly credible, must not be, in the slightest degree, biassed or partial to one party or the other. Therefore, if it appear that the witness is prejudiced against the party against whom he appears, or has before expressed sentiments indicative of such prejudice, or if it appear that a prosecution is pending against him for the same or a similar offence, and he come to disprove some of the facts charged in the indictment against the defendant—all these are circumstances which detract proportionably from his credit. In cases where the defendant is not obliged to appear personally at the trial, as in the case of informations and of indictments in the Court of King's Bench, the witness's being liable as one of the defendant's bail, not merely goes to his credit, but seems to be an objection even to his competency; at least such is the case in civil actions. Where the prosecutor is to derive an advantage from a conviction of the defendant, this is no objection to his competency; it goes to his credit merely. A father is a competent witness for his son, and a son for his father; but the interest arising from the relationship detracts proportionably from the credit of the witness. See *Gill. Ev.* 149, 155.

The defendant may be cross-examined as to his being interested; see *Daxon v. Haigh*, 1 *Esp.* 409; and indeed, it may be doubted whether you would be allowed to prove his interest in any other way, until you had first cross-examined him upon the subject. If he acknowledged that he was once interested, he will be allowed afterwards to prove that his interest has determined, without producing the instrument by which his interest was so determined. *Butchers' Co. v. Jones*, 1 *Esp.* 160; *Botham v. Swingler*, *id.* 164. See 2 *Stark. N. P.* 433; 2 *Camp.* 14. *M. & M.* 321, *n.*; 1 *C. & P.* 234; 2 *Per & D.* 538. But if his interest have been proved by other witnesses, the instrument which has determined it must be produced.

From their Integrity.—As to cross-examining the witness himself upon the subject of any offence imputed to him, there seems to be a difference of opinion among the judges upon the point: some hold that you cannot ask a question of a witness, the answer to which in the affirmative would subject him to punishment; others that you may ask the question, but that the witness is not bound to answer it; and others, include in the rule, not only questions, the answers to which might subject the witness to punishment, but also all those where the witness by his answer, might be obliged to allege his own infamy or turpitude, although they might not subject him to any punishment. See the cases collected, 2 *Russ.* 626 *et seq.* In *R. v. Holding*, Old Bailey, June, 1821, *Bayley, J.*, held that a witness may be asked a question, the answer to which may subject him to punishment, but he is not compellable to answer it: and in *R. v. Slaney*, 5 *C. & P.* 213, Lord *Tenterden* said, that a witness would not be compellable to answer a question which would tend to criminate him. All other questions, for the purpose of impeaching a witness's character, may not only be put, but must be answered. See *Cundell v. Pratt*, 1 *Moo. & M.* 108. And a witness cannot refuse to produce a document kept by him under the authority of an act of Parliament, on the ground that it may criminate himself. *Bradshaw v.*

mony, and in such case the witness is to be allowd, but the credit of his testimony is left to the jury, who are judges of the fact, and likewise of the probability or improbability, credibility or incredibility of the witness and his testimony, and

Murphy, 7 C. & P. 612. If the witness be examined as to the offence imputed to him, and deny it, such denial is conclusive, and you cannot afterwards call witnesses or offer other evidence to contradict him. *R. v. Watson*, 2 Stark. 149 et seq. *Harris v. Tippet*, 2 Camp. 627. Or if general evidence be given of the bad character of a witness, the opposite party may cross-examine the witnesses as to the grounds of their opinion, if he think it prudent to do so; or he may call witnesses who can speak to the general good conduct of the witness, or contradict any particular facts the other witnesses may have disclosed in their cross-examination. Where a witness refuses to answer a question, his not answering ought not, legally, to have any effect with the jury. *R. v. Watson*, 2 Stark. 157; *Ross v. Blakemore*, Ry. & M. N. P. 382; *Lloyd v. Passingham*, 16 Ves. 84.

In *The Queen's case*, it was holden, that where a witness for a prosecution has been examined in chief, the defendant cannot afterwards give evidence of any declaration by such witness, or of acts done by him, to procure persons corruptly to give evidence in support of the prosecution, unless he have previously cross-examined such witness as to such declarations or acts. 2 B. & B. 311.

From their Veracity.—The character of a witness for habitual veracity is an essential ingredient in his credibility; a man who is capable of uttering a deliberate falsehood is in most cases capable of doing so under the solemn sanction of an oath. If, therefore, it appear that he has formerly said or written the contrary of that which he has now sworn, (unless the reason of his having done so be very satisfactorily accounted for, his evidence should not have much weight with a jury; and if he have formerly sworn the contrary, that fact, (although no objection to his competency, *R. v. Teal*, 11 East, 309,) is almost conclusive against his credibility. In strictness, you cannot ask a witness if at a former trial he swore differently from what he is now swearing; but you should give in evidence an examined copy of the record of the former trial, or at least the *nisi prius* record (if the cause have been tried at *Nisi Prius*.) *Fisher v. Kitchingman*, Barnes, 449; *Foster v. Compton*, 2 Stark. 364, and then prove what the witness swore at that trial, either by having it read from the judge's notes, or proved upon oath from the notes or recollection of any person who was present at the time. *Mayor of Doncaster v. Day*, 3 Taunt. 262; *Gill. Ev.* 68, 69. Or, if the former declaration of the witness were not made by him as witness in a cause, yet if it were in writing, it is irregular to question him as to the contents of it; you should produce it, ask him if it be his handwriting, and then give it in evidence. In *The Queen's case*, it was holden, that in cross-examining a witness you cannot state to him the contents of a letter, and then ask him if he ever wrote such a letter; but you should shew him the letter, ask him if it be of his handwriting, and if he admit it, then give the letter in evidence. Or you may shew him part of the letter, and ask him if he wrote that part: but if he do not admit that he wrote it, you cannot then proceed to cross-examine him as to the contents of the letter; *The Queen's case*, 2 B. & B. 286; nor, even if he admit it to be his handwriting, can you question him whether statements, such as you suggested to him, are contained in the letter; but the entire letter must be given in evidence. *Id.* 288.

The witness cannot be asked whether he did or did not state a particular fact before the magistrate, without first allowing him to read, or have read to him, his deposition. *Reg. v. Taylor*, 8 C. & P. 726. Where an accomplice who could not read gave evidence falling very short of what he had stated before the magistrate, the judge allowed his deposition, signed with his mark, to be shewn to him.

these exceptions are of that great variety and multiplicity, that they cannot easily be reduced under rules or instances. 2. Exceptions to the competency of the witness, which do exclude him from giving his testimony, and of these exceptions the

but would not allow it to be read to him, in order that the prosecuting counsel might examine upon it. *Reg. v. Beardmore*, 8 C. & P. 260. If the prisoner denies his signature or mark to the deposition, it may be proved by the evidence of any competent person who heard it taken; and it is not necessary to prove it by the magistrate or his clerk, *Reg. v. Hallett*, 9 C. & P. 748; *Reg. v. Hearn*, 1 C. & Mar. 109, any more than in the case of a confession.

But if the former declaration of the witness were not in writing, but merely by parol, and not made by him as witness in a cause, in that case you may cross-examine him on the subject of it; and if he deny it, you may call another witness to prove it. So, if a witness admit that when before the magistrate he was cross-examined for the prisoner, and it appears that such cross-examination is not returned with the depositions, he may be questioned by the prisoner's counsel as to the answers he gave. *R. v. Edwards*, 8 C. & P. 25. So, if it appear that a statement of the witness before the magistrate, although written down by him, was not read over to the witness, nor signed by him or by the magistrate, the witness may be cross-examined as to such statement without producing the writing. *Reg. v. Griffiths*, 9 C. & P. 746. So, a witness may be cross-examined as to his statement before the grand jury in the same case. *Reg. v. Gibson*, 1 C. & Mar. 672. If, however, a witness, when examined in chief as to the occurrence of a fact, answer that he does not remember it, the counsel on the opposite side cannot give evidence of a former declaration by the witness of the fact having occurred, unless he have in cross-examination questioned the witness as to such declaration; for the fact may have occurred, and the witness have formerly declared his knowledge of it, and yet he may not recollect it at the time of his examination. *The Queen's case*, 2 B. & B. 299. It may be necessary also to state, as a general rule, that a witness cannot be cross-examined as to any distinct collateral fact, not relevant to the matter in issue, for the purpose of disproving the truth of the expected answer by other witnesses, in order to discredit the whole of his testimony. *Spenceley v. Willott*, 7 East, 108.

A consideration of the probability of the fact also may aid in forming a judgment of the credit that should be given to a witness for veracity. If he tell of a fact having occurred which is contrary to common experience and observation, it will require that his integrity, veracity, and means of knowledge should be indisputable, to induce us to believe it; but if, on the contrary, the fact stated by him be very likely to have happened, we may be induced to believe it, without very scrupulously inquiring into his character for integrity, veracity, &c. The strength of the evidence should always be great in proportion to the improbability of the fact to be established by it.

It may be necessary to observe, that if a witness called to prove a fact prove the contrary, his credit cannot be impeached by general evidence; *Ever v. Ambrose*, 2 B. & C. 750; *Bull. N. P.* 297; but the party is at liberty to make out his case by other and contradictory evidence, for the other witnesses are not called directly to impeach the credit of the first. *Id.*; *Reg. v. Ball*, 8 C. & P. 745. It seems, also, that it is not competent for a party to shew that his own witness has at any time given a different account of the same transaction. 3 B. & C. 746; *Reg. v. Farr*, 8 C. & P. 768; *Reg. v. Ball*, *supra*. In one case, however, where the judge called a witness upon the back of the indictment, who gave evidence in form against the defendant, and the judge ordered the deposition of the witness before the coroner to be read, to shew its inconsistency with the testimony then given, the twelve judges thought him right in so doing, and Lord Ellenborough and Mansfield, C. J., thought that the prosecutor had the

court is the judge, and of these latter kind of exceptions I am here to treat.

If a person be outlawd in a personal action, it is a good cause of challenge against him as a juror, but yet he shall be sworn as a witness notwithstanding his outlawry. *Coke super Lit.* §. 1. fol. 6. b.

The common incapacities or incompetencies of witnesses are reckoned up by my lord *Coke ubi supra*, viz. 1. If he be attaind of giving a false verdict. 2. Or attaind of a conspiracy at the king's suit, for then he is to have a villainous judgment and *amittere liberam legem*, otherwise it is if he be only attaind at the suit of the party: vide 24 E. 3. 73. b. 43 E. 3. 33. b. 4 H. 5. Judgment 220. 46 Assiz. 11. 27 Assiz. 59. 3. If he be convict of perjury. 4. Convict of a *præmunire*. 5. Convict of forgery upon the statute of 5 Eliz. cap. 14. but [not] a conviction upon the statute of 1 H. 5. cap. 3. 6. If he be convict of felony.^(a) And therefore it should seem, that an approver shall not be sworn as a witness, if the appellee plead to the country, but only his general oath, that he taketh at the time of his becoming an approver, shall be taken, *quod tamen quære*, for this case differs from the testimony of a person convict, for the approver accuseth himself as well as the appellee. 7. If by judgment he hath lost his ears. 8. Or by judgment stood upon the pillory. 9. Or tumbrel. *Co. P. C.* 219. for they are thereby infamous. 10. Or been branded, *stigmaticus*. 11. Or being a champion in a writ of right becomes [278] recreant or coward, for these render a person infamous, so that he loseth *liberam legem*. [2]

(a) See *Dangerfield's* case in the trial of lord Castlemain, *Stat. Tr. Vol. III. p. 42. Raym.* 379. and the trial of *Eliz. Cellier*, *Stat. Tr. Vol. III. p. 35. Raym.* 369.

same right. *R. v. Oldroyd*, *R. & R.* 88. See *Archbold Crim. Plead & Ev.* p. 149.

[2] Before the passing of the statute 6 & 7 Vict. c. 85, persons convicted of treason, felony, piracy, *præmunire*, perjury, forgery, 2 *Hawk. c. 46, s. 19; Gilb. Ev.* 139; 2 *Roll. Abr.* 616; *Co. Lit.* 6; or any other species of the *crimen falsi*, such as conspiracy, barratry, and the like; *R. v. Priddle*, 1 *Leach*, 442; *R. v. Ford*, 2 *Salk.* 690; see *Bushell v. Barrott*, *Ry. & M. N. P.* 434, were not allowed to give evidence. Formerly it was the general opinion, that standing in the pillory for any offence, or undergoing any other species of infamous corporal punishment, incapacitated a man from being a witness: 2 *Hawk. c. 46, s. 19; Co. Lit. 6. b.; R. v. Carter*, 5 *Mod.* 74; 2 *Salk.* 461, 689: but it was afterwards settled that it was the infamy of the crime, and not the nature or mode of the punishment, that destroyed the competency; *Pendock v. Mackinder*, 2 *Wils.* 18; *Gilb. Ev.* 140; and therefore, though a man stood in the pillory for a libel, or for seditious words, or the like, he was not thereby disabled from being a witness. *Gilb. Ev.* 140, 141; 3 *Lev.* 426. So, outlawry in a civil suit did not render a man incom-

But yet in these exceptions these things are to be observed.

1. That he that allegeth this exception ought to shew forth a copy of the record attested or vouch the roll in court.[3]
2. That if the king pardon these offenders, they are thereby rendered competent witnesses, tho their credit is to be still left to the jury, for the king's pardon takes away *pœnam & culpam*

petent as a witness. *Ca. Lit. 6. b.*; 2 *Hawk. c. 46, s. 21*; nor a conviction for keeping a gaming-house; *R. v. Grant, Ry. & M. N. P. 270*. Nor had the mere commission of any offence that effect, unless the party had been actually convicted of it. *Keb. 17, 18*; 1 *Sid. 51*; *Cowp. 3*. See 11 *East, 309*.

A pardon, also, of any of these offences, had the effect of restoring competency, in as full a manner as if the witness had never been convicted; 2 *Hawk. c. 46, s. 22*; *Gillb. Ev. 141, 142*; except in two cases only, viz. perjury on the stat. 5 *El. c. 9*, and conspiracy at the suit of the queen; *R. v. Guisse, 1 Ld. Raym. 257*; *R. v. Ford, 2 Salk. 690*; 2 *Hawk. c. 46, s. 22*; and so had the endurance of the punishment, upon a conviction for any felony not capital, or for any misdemeanor, except perjury and subornation of perjury. 6 *G. 4, c. 25, s. 2*; 9 *G. 4, c. 32, ss. 3, 4*.

But now, by the stat. 6 & 7 *Vict. c. 85, s. 1*, no person offered as a witness shall be excluded by reason of incapacity from crime or interest from giving evidence, either in person, or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties authority to hear, receive, and examine evidence; but every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation, in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence. See *Archbold Crim. Plead. & Ev. p. 144*.

[3] Some of the late law writers draw a distinction between what they call conviction and judgment and aver that conviction will in no case exclude a witness on the ground of infamy without judgment. (See 1 *Stark. on Ev. 95*. 1 *Greenl. on Ev. § 375*. 2 *Russ. on Crimes, 974*.) This doctrine is in express contradiction of Lord Hale and Sergeant Hawkins, who allege that conviction will in the cases which they give render infamous, and plainly not confounding it with judgment, of the value of which and the distinction between them they speak in the same connexion, (see 2 *Hale 277*; 2 *Hawkins ch. 46. § 19. Ca. Litt. 6 b.*) all the cases referred to by the later writers (ut supra) will be found to extend only to conviction by verdict and to that extent the doctrine is a sound one, because as Lord Mansfield says in *Lee v. Gansell, Cowp. p. 1*, the party has his right to his motion in arrest of judgment.—A right as sacred and as much belonging to the party as his trial for that verdict. But conviction by verdict, if verdict alone can be technically called conviction, is not the only conviction; Lord Hale, speaks of the defendant in that case not as one convict, but as one convict by verdict. (See 2 *Hale 228*.) Where the defendant on arraignment pleads guilty to the indictment this is conviction, (2 *Hale 225*) and what reason can be given why the person thus convict should not be excluded as infamous as well before as after judgment, particularly under the later doctrine that it is the crime and in no case the infamy of the punishment that incapacitates.

in foro humano, *M. 12 Jac. B. R. Cuddington & Wilkins*: (b) but yet it makes not the man always an honest man, and therefore he shall not be a juryman 11 *H. 4. 41.* but yet may be a witness against the opinion of my lord *Coke* in *Crashaw's* case, *M. 11 Jac. B. R. Bulstrode* 154. *quod vide.*

If a man be convict of felony, and prays his clergy, and is burnt in the hand, he is now a competent witness, for by the statute of 18 *Eliz. cap. 7.* it countervails a purgation and a pardon, and he is thereby enabled afterwards to acquire goods; *Hob. 288. Searle and Williams.*

And so it is if he be in orders, whereby burning in the hand is discharged by the statute of 4 *H. 7. cap. 13. Hob. ubi supra.*

And so it is if the burning in the hand be pardoned, *Hob. ibid.* or if he prays his clergy, tho the court do respite his reading, *quare, vide Holcroft's* case, 4 *Co. Rep. 46. a.*

There are certain other matters, that render a man incompetent to be a witness, tho they are not such as render him infamous by judgment or award in any of the king's courts.

1. Some are disabled in regard of defect of intellectuals: A person of *non sane memory* cannot be a witness, while he is under that insanity, but if he have *lucida intervalla*, then during the time he hath understanding he may be a witness.[4] *Co. Lit. ubi supra.* But it is a difficulty scarcely to be cleared, what is the *minimum, quod sic* disables the party.

If an infant be of the age of fourteen years, he is as to this purpose of the age of discretion to be sworn as a witness, but if under that age, yet if it appear that he hath a competent discretion, he may be sworn.[5]

But in many cases an infant of tender years may be examined without oath, where the exigence of the case [279] requires it, as in case of rape, buggery, witchcraft, *de quibus vide quæ supra, Part I. cap. 24. p. 302. & cap. 58. p. 634. & infra, p. 283.*

2. It is said by my lord *Coke ubi supra*, that an infidel is not to be admitted as a witness, the consequence whereof would also be, that a *Jew*, (who only owns the old testament) could not be a witness.

(b) *Hob. 67 & 89.*

[4] *Gilbert on Ev. 144, Com. Dig. Testm. (A. 1.) Livingston v. Kiersted, 10 Johns. 362; Evans v. Hettich, 7 Wheat. 453.* One deaf and dumb may be examined by an interpreter who understands his signs. *R. v. Rustin, 1 Leach, 408; 1 Russell, p. 7.*

[5] *R. v. Powell, 1 Leach, 110; R. v. Brazier, ib. 199; R. v. Travers, 2 Stra. 700; Gibb. on Ev. 144; R. v. Williams, 7 C. & P. 320; Buller's N. P. 293; Jackson v. Gridley, 18 Johns. 98.*

But I take it, that altho the regular oath, as it is allowd by the laws of *England*, is *tactis sacrosanctis Dei evangelis*, which supposeth a man to be a christian, yet in cases of necessity, as in foreign contracts between merchant and merchant, which are many times transacted by *Jewish* brokers, the testimony of a *Jew*, *tacto libro legis Mosaicæ* is not to be rejected, and is used, as I have been informed, among all nations.[6]

Yea, the oaths of idolatrous infidels have been admitted in the municipal laws of many kingdoms, especially *si juraverit per verum Deum creatorem*, and special laws are instituted in *Spain* touching the form of the oaths of infidels. *Vide Covarruviam, Tom. I. part 1. de juramenti forma.(c)*

And it were a very hard case, if a murder committed here in *England* in presence only of a *Turk* or a *Jew*, that owns not the christian religion, should be dispunishable, because such an oath should not be taken, which the witness holds binding, and cannot swear otherwise, and possibly might think himself under no obligation, if sworn according to the usual style of the courts of *England*.

But then it must be agreed, that the credit of such a testimony must be left to the jury.

3. Some regularly are disabled in respect of the civil unity of their persons, as the husband regularly is not allowed to be a witness for or against the wife, or *à converso*; but *vide* touching this also at large *Part I. cap. 24. in fine & ibid. cap. 64. p. 693. super statut. 1 Jac. cap. 11.*[7]

(c) P. 249. Edit. Antwerp. 1614.

[6] *Omichund v. Barker*, Willès, 538; 1 *Atk.* 19; 1 *Wils.* 84; *Buller's N. P.* 292; *R. v. Taylor*, Peake, 11; *R. v. Entreckman*, 1 *Car. & Marsh.* 248; *Bulls v. Stuartwood*, 2 *Cowen*, 431; *People v. Matteson*, 2 *Cowen*, 433; *Wakefield v. Ross*, 5 *Mason*, 18. See *Hunscom v. Hunscom*, 15 *Mass.* 184; *Atwood v. Welton*, 7 *Conn.* 66; *Curtis v. Strong*, 4 *Day*, 51. As to the way and time of taking objection to competency of witness in this respect, see note to 1 *Greenl. on Ev. sect.* 370.

[7] It is a general rule of evidence that husband and wife cannot be witnesses either for or against each other; *Oo. Litt.* 6. b.; *Gillb. Ev.* 133, 134; *Davis v. Dinwoody*, 4 *T. R.* 678; 2 *T. R.* 263; *Hardw.* 264; *Bac. Abr., Evidence*, (A. 1.); see 1 *Str.* 504; nor against any other person indicted jointly with the husband or wife; *R. v. Smith*, 1 *Mood. C. C.* 289; and it is doubtful if this rule do not extend to the case of a woman cohabiting with a man and passing as his wife. See *Campbell v. Troemlow*, 1 *Price*, 81. Where several were indicted for a conspiracy, Lord *Ellenborough* refused to allow the wife of one of them to give evidence in favour of some of the others; for, if all the others were acquitted, the husband must consequently have been acquitted also. *R. v. Locker*, 5 *Esp.* 107; and see *R. v. Frederick*, 2 *Str.* 1094. So, in conspiracy, the wife of one of the defendants should not be allowed to give evidence against any of the others, as to any act done by him in furtherance of the common design, particularly after evidence given connecting the husband with that defendant in the general conspiracy. *R. v. Sergeant, R. & M. N.*

4. Some are disabled to be witnesses in respect, that they are concerned in interest.

And therefore a party to an usurious contract, if the money be unpaid, shall not be received as a witness to [280] prove the usury, because he avoids thereby his own security, but otherwise it is, if the money be already paid, and the security taken up, for then he is allowable to be a witness for the king. (d)

A. wounds *B.* for which he is indicted, yet *B.* may be a witness for the king; but this shall be no evidence in an action brought by *B.* for the assault, tho *A.* be convict at the king's suit.

If a reward be promised to a person for giving his evidence before he gives it, this, if proved, disables his testimony.

And so for my own part I have always thought, that if a person have a promise of a pardon, if he gives evidence against

(d) *Co. Litt. 6. b.*

P. 352. So, a married woman cannot be called to prove a conversation between the prisoner and her husband, which goes to shew that her husband and the prisoner committed the felony for which the prisoner is tried. *R. v. Glead, Harrison's Dig.* 849. But the wife of a person already convicted for the same offence is a competent witness against the prisoner. *Reg. v. M. Williams, C. & P.* 284.

To the rule above laid down, however, there are several exceptions, namely, *First*, in cases of high treason, husband and wife may be witnesses against each other. *R. v. Griggs, T. Raym.* 1; but see 1 *Br. & Gold.* 47; *Co. Litt.* 66; 1 *Hale*, 301, *cont.*; and see 1 *Hale*, 48, *dub.* *Secondly*, when the husband is indicted for a personal injury to the wife, the latter is a competent witness to support the prosecution; *Bull. N. P.* 286; 1 *Hale*, 301; and the same, when the wife is indicted for a personal injury to the husband. Where a husband was indicted for being present, aiding and assisting another in committing a rape upon his own wife, the wife was holden to be a competent witness to prove the offence; *R. v. Audley*, 1 *St. Tr.* 393; and the same where a husband was indicted for the battery of his wife. *R. v. Azye*, 1 *Str.* 635. So, upon an indictment against a man for the murder of his wife, the dying declarations of the wife were allowed to be given in evidence against him. *R. v. Woodcock*, 2 *Leach*, 563; *R. v. John*, 1 *East*, P. C. 357. *Thirdly*, upon an indictment for bigamy, the second wife is a competent witness against the defendant, the first marriage being previously proved; for the second marriage is void; 1 *Hale*, 393. So, upon an indictment for forcible abduction and marriage, the woman is a competent witness against the defendant; for a contract obtained by force has no obligation in law. *Bull. N. P.* 286; 1 *Hale*, 302; *R. v. Wakefield*, *publ. by Murray*, 257. These last, however, are not really exceptions to the rule above mentioned; for here the woman is not, in law, the wife of the defendant.

A father or mother may be a witness for or against the child; *R. v. Mayor of Oakhampton*, 1 *Wils.* 332; 2 *T. R.* 263; 6 *T. R.* 330; *Hardw.* 277; 1 *Salk.* 289; 2 *Str.* 925, 940; *Cowp.* 591; a child, for or against the father or mother; *Gill. Ev.* 135; a servant, for or against the master or mistress; *Id.* a master or mistress for or against the servant. See *Archbold Crim. Plead. & Ev. p.* 147.

one of his own confederates, this disables his testimony if it be proved upon him.^(e)[8]

Yet in some cases a consequential benefit to the witness doth not disable his testimony, tho it may abate the credit of his testimony.

A. B. and *C.* are severally indicted for perjury in proving a bond, *A.* traverseth the indictment, *B.* and *C.* tho indicted for the same offense, yet not being convicted may be witnesses for *A.* to prove the bond sealed. *P. 19 Car. 1. B. R. Rot. 2.* adjudged in the case of *Billmore, Gray, and Harbin*, and accordingly ruled *P. 40 Eliz. C. B. Gunston and Downs(f)* in three actions severally brought against three persons for perjury in *Chancery* in one and the same point, for the other two are not

^(e) However the contrary opinion hath prevailed, see *Tong's case*, *Kel. 18.* and *Layer's case Stat. Tr. Vol. 6. p. 257.* but most certainly it is a great objection to the credibility, if not to the competency of the witness, *vide supra, Part I. p. 304.*

^(f) 2 *R. A.* 685. pl. 3.

[8] An accomplice was always a competent witness although his expectation of pardon depended upon the defendant's conviction. *Gill. Ev. 136; 2 Hawk. c. 46, s. 94.* See *Say, 289; Mead v. Robinson, Willes, 423.* So, an accessory is a competent witness against his principal and the principal against the accessory; as, for instance, upon an indictment for receiving stolen goods, the person who stole the goods is a competent witness. *R. v. Patram, 2 East, 782; R. v. Haslam, 1 Leach, 467.* But the fact of the witness's being an accomplice, accessory, or principal, detracts very materially from his credit; *Gill. Ev. 136;* and it is always considered necessary, (although in strict law it is not essential, see *R. v. Hastings, 7 C. & P. 152.*) in order to induce the jury to credit his testimony, to give other evidence confirmatory of, at least, some of the leading circumstances of his story from which the jury may be able to presume that he has told the truth as to the rest. See *Cowp. 336.* If, upon an indictment against several, the accomplice be confirmed in the testimony he gives against some of the prisoners, but not as to the others, still this has been holden sufficient confirmation to warrant the conviction of all. *R. v. Dawber, 3 Stark. 43, & n.* And see *R. v. Jones, 2 Camp. 131.* And it has been said, that if an accomplice be confirmed as to the particulars of the story, he does not require confirmation as to the person charged; *R. v. Birkett, R. & R. 252;* but this doctrine has been rejected in late cases; inasmuch as the confirmation as to the circumstances proves only that the accomplice was participant in the felony, not that the particular party charged was his confederate. *R. v. Webb, 6 C. & P. 595; R. v. Wilkes, 7 C. & P. 172; R. v. Farler, 8 C. & P. 107; Reg. v. Dyke, Id. 261; Reg. v. Birkett, Id. 732.* And where upon an indictment against principal and accessories, the case against the principal was proved by an accomplice, who was confirmed as to the accessories, but not as to the principal, the jury were directed to acquit the prisoners. *R. v. Wells, Moo. & M. 236; R. v. Moores, 7 C. & P. 270.* Nor ought a prisoner to be convicted upon the evidence of any number of accomplices, unconfirmed by other testimony. *R. v. Noakes, 5 C. & P. 236.* The testimony of the wife of an accomplice is not such evidence as a jury ought to rely upon as confirmation of his statement. *R. v. Neal, 7 C. & P. 168.* A prisoner who employed another person to harbour a principal felon was convicted on the uncorroborated testimony of the person who actually harboured him. *R. v. Jarvis, 2 M. & Rob. 40; Archbold Crim. Plead. & Ev. p. 146.* See *People v. Whipple, 9 Cowen, 707; Com. v. Knapp, 10 Pick. 477.*

immediately concerned in this trial, tho consequentially they are concerned, the point being the same.

If *A.* bring an action upon the statute of *Winton* against the hundred, none that live or have land in the hundred shall be admitted to give evidence for the hundred. *M. 1650. Bennet versus Hundred de Hertford. (g)*

Yet if a person be taken and indicted for the robbery, they of the hundred may be admitted to prove the defendant guilty of the robbery, and that he was taken upon their pursuit, tho this doth consequentially discharge the hundred upon the statute of *Winton*, & 27 *Eliz. cap. 13.* [281]

A. brings an action against *B.* wherein *C.* is produced as a witness for *A.* and *A.* recovers upon his testimony, *C.* is thereupon indicted of perjury *contra formam statuti*(*) *ad grave dampnum ipsius B.* *C.* pleads *not guilty*, ruled that *B.* shall not be received to give evidence against *C.* because he is the party grieved, and shall recover 20*l.* *M. 1650. B. R. Bacon's case, 2 Roll. Abr. 885. pl. 4.* and yet it seems he shall not recover the 20*l.* upon the indictment, but must bring his action upon the statute; and yet constant experience, and the very statute of 21 *H. 8. cap. 11.* that gives restitution of goods to the party prosecuting an indictment of felony makes it evident, that he may be, and indeed ought to be the witness to convict the felon, tho thereupon he is to have restitution of the goods stolen.

If the tenant robs his lord, or the lessee for life the reversioner, or a resiant the lord of the franchise that hath *bona felonum*, these may be witnesses upon an indictment or trial of the felon, notwithstanding the consequential advantage that accrue by the attainder or conviction of the party, yet the credibility of their testimony is to be left to the jury. But if *A.* hath a promise or grant of the goods of *B.* arrested of felony in case he be convict, I should never allow *A.* to be a witness to convict *B.* for he by his own act after the felony committed acquires the interest, and so acts and swears for his own advantage.

A. brings an appeal against *B.* for the death of *C.* his father or her husband, *A.* cannot be a witness against *B.* upon *not guilty* pleaded, because it is his or her own suit.

But if *A.* be nonsuit upon the appeal, and so the prisoner is arraigned upon the appeal at the king's suit, [282] now *A.* may be a witness, because now the prosecution is merely for the king.

(g) 2 *R. A. 685. pl. 6. Styl. 233.* but this is now altered by 8 *Geo. 2. cap. 16.* for by that statute, "Any person inhabiting within the hundred or any franchise thereof shall be admitted as a witness on behalf of the hundred in the same manner, as if he were not an inhabitant of that hundred, but resided in any other hundred whatsoever."

(*) *Viz. 5 Eliz. cap. 9.*

• If a man be indicted of high treason, the king cannot by his great seal or *ore tenus* give evidence, that he is guilty, for then he should give evidence in his own cause; *vide supra*, cap. 28. p. 217. & Part I. cap. 26. p. 344. the case of the earl of Lancaster.

Nay, altho he may in person sit on the king's bench, yet he cannot pronounce judgment in case of treason, but it is performed by the *senior* judge, for as he cannot be a witness, so he cannot be a judge in *propria causa*. [9]

And the same law is for felony for the same reason, yet in some cases the king's testimony under his great seal is allowable, as in an *essoîn de servitio regis*, the warrant under the great seal(h) is a good testimonial of it. *F. N. B.* 17. *Stat. Glouc.* cap. 8.

Now as touching the compulsory means to bring in witnesses they are of two kinds. [10] 1. By process of *subpœna* issued in the king's name by the justices of peace, *oyer* and *terminer*, gaol-delivery, or king's bench, where the plea of *not guilty* is to be tried. 2. Which is the more ordinary and more effectual means, the justices or coroner that take the examination of the person accused, and the information of the witnesses, may at that time, or at any time after, and before the trial bind over the witnesses to appear at the sessions, and in case of their refusal either to come or to be bound over, may commit them for their contempt in such refusal, and this is virtually included within their commission and by necessary consequences upon the statute of 1 & 2 P. & M. cap. 13. whereof before, p. 52.

But that which is a great defect in this part of judicial admi-

(h) But not under the privy seal. 2 Co. Inst. 314. *super stat. Gloucester.*

[9] Bracton in speaking of the rights of one appealed or accused by an individual of a crime and the various objections which the defendant may take to the accusation says, "Ad exceptiones istas, oportet quod appellans respondeat ad singulos articulos per ordinem, ut sic reducat appellum ad iudicium. Et tunc videndum quis possit et debeat judicare, et sciendum quod non ipse Rex, qui sic esset in querela propria actor et iudex, in iudicio vite, membrorum et exheredationis, quod quidem non esset si querela esset aliorum. Item justiciarius non, cum in iudiciis personam domini Regis cuius vices gerit, representet. Quis ergo iudicabit? videtur, sine præiudicio melioris sententie, quod curia et pares iudicabunt, ne maleficia remaneant impunita, et maxime ubi periculum vite fuerit et membrorum vel exheredationis cum ipse Rex pars actrix esse debeat in iudicio." "Si autem levis fuerit transgressio quæ poenam infligit pecuniariam tantum et levem, bene possunt justiciarii sine paribus judicare. Si autem gravis fuerit transgressio et proxima exheredationi, quod redemptionem inducat, ibi debent pares justiciarii associari, ne ipse Rex per seipsum vel justiciarios suos sine paribus actor sit et iudex. And see Pulton, 239, a.

[10] The right to the compulsory process of the court for obtaining witnesses in his favor is guaranteed to the prisoner in criminal cases by the Constitution of the United States. (*Amendments*, art. 6.) And by most of the State Constitutions.

nistration, is, that there is no power to allow witnesses their charges, whereby many times poor persons grow weary of attendance, or bear their own charges therein to their great hindrance and loss. (*) [11]

II. As to the second matter in what manner the [283] evidence is to be given.

Regularly the evidence for the prisoner in cases capital is given without oath, tho the reason thereof is not manifest, (i) but [otherwise it is] in all cases not capital, tho it be misprision of treason: neither is counsel allowed him (k) to give evidence to the fact, nor in any case, unless matter of law doth arise. 1 H. 7. 23 Co. P. C. p. 137.

But in some special felonies by act of parliament the prisoner's witnesses in cases capital shall be examined upon oath at his trial, namely the statute of 31 Eliz. cap. 4. against imbezling of the king's ordnance, giving liberty to the prisoner to make lawful proof by witness or otherwise, seems virtually to allow the prisoner's testimony upon oath. Co. P. C. cap. 22. p. 79.

And the statute of 4 Jac. cap. 1. touching felonies upon the borders, &c. gives examination of the prisoner's witnesses upon oath.

If a witness be produced and sworn for the king, yet if that witness alledge any matter in his evidence, that is for the prisoner's advantage, (as many times they do,) that stands

(*) On conviction, in general, for any felony, the reasonable expences of prosecution are by stat. 25 Geo. 2. c. 36. to be allowed to the prosecutor out of the county stock, if he petitions the judge for that purpose; and by stat. 27 Geo. 2. c. 3. poor persons, bound over to give evidence, are likewise intitled to be paid their charges, as well without conviction as with it.

(i) Nay, it is manifestly against all reason, that the prisoner should not be allow'd the same liberty to make out his innocence, as is allowed to prove his guilt, and tho it has been an usual practice not to suffer witnesses for the prisoner in capital cases to be examined upon oath, yet as lord Coke observes P. C. p. 79. there is not so much as *sciintilla juris* for it, it being unsupported by any act of parliament, antient author, book case, or record: See Sir John Hawles's remarks on *College's* trial. *State Tr.* Vol. IV. p. 178. To remedy this inconvenience it was provided by 7 W. cap. 3. "That every person indicted for high treason, whereby corruption of blood may be made, shall be admitted to make his defense by witnesses on oath," but this statute being defective it is further provided by 1 Ann cap. 9. "That the witnesses for the prisoner in any trial for treason or felony shall give their evidence upon oath in like manner, as the witnesses for the crown, and if convicted of perjury shall be subject to the same penalties, forfeitures, &c."

(k) Upon an indictment, but it is otherwise in an appeal. *Corone* 31. 9 E. 4. 2. a. 1 H. 7. 26. a.

[11] Now provided for by statute 7 Geo. IV. chap. 64.

as a testimony upon oath for the prisoner, as well as for the king.

Regularly the king's evidence is given upon oath against the prisoner, and ought not to be admitted otherwise than upon oath; nay, instances have been given of very [284] young witnesses sworn upon evidence in capital causes, *viz.* one of nine years old. *Dalton's Justice*, cap. 111. p. 297:(1)

Yet such very young people under twelve years old I have not known examined upon oath, but sometimes the court for their information have heard their testimony without oath, which possibly being fortified with concurrent evidences may be of some weight, as in cases of rape, buggery, witchcraft, and such crimes, which are practised upon children: *vide supra*, Part I. cap. 24. p. 302 & cap. 58. p. 634. & *supra*, p. 279.

CHAPTER XXXVIII.

CONCERNING EVIDENCE IN WRITING.

By the statute of 1 & 2 P. & M. cap. 13. and 2 & 3 P. & M. cap. 10.[1] Justices of peace and coroners have power to take examinations of the party accused, and informations of the accusers and witnesses, (the examinations to be without oath, the informations to be upon oath,) and are to put the same in writing, and are to certify the same to the next gaol-delivery.

These examinations and informations thus taken and returned may be read in evidence against the prisoner, if the informer be dead, or so sick, that he is not able to travel, and oath thereof made; otherwise not.

But then, 1. Oath must be made either by the justice or coroner, that took them, or the clerk that wrote them, that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination. 2. As to the examination of the prisoner, it must be testified, that he did it freely without any menace, or undue terror in-

(1) *N. Edit.* cap. 164. p. 541.

[1] Repealed and substituted by 7 Geo. IV. ch. 64.

posed upon him; for I have often known the prisoner disown his confession upon his examination, and hath sometimes been acquitted against such his confession; and [285] the reason why these examinations and informations are allowable in evidence (under the cautions above premised,) is, because they are judges of record, and the informations before them upon oath are authorized and required by act of parliament, and they are judges of the crimes upon which the informations are taken.

Welsh forceably took away *Mrs. Puckring* and married her, and thereupon a temporary act of parliament was obtained, enabling commissioners therein named to hear and determine that marriage, and to dissolve it, if there were cause: In that cause *Mrs. Puckring* herself was examined touching the manner of the marriage, as a supplemental proof, and died hanging the suit, *Welsh* was after indicted upon the statute of 3 H. 7. for this fact for felony, and it was moved, that this examination of *Mrs. Puckring* might be read in evidence against the prisoner, but it was denied. 1. Because it was a proceeding according to the civil law in a civil cause. 2. Because that suit was originally at the instance of *Mrs. Puckring* and her own cause, and tho she be according to the civil law examinable, as a supplemental proof, yet it was a cause for her own interest, and therefore at common law not allowable, tho the commissioners that took the examination were judges constituted by that which then was allowed to be an act of parliament. *M. 1652; B. R.*

A. commits a felony in the county of *B.* and flies into the county of *C.* and there is taken and brought before a justice of peace of the county of *C.* where *A.* is examined, and informations upon oath taken by that justice, tho the justice of peace of the county of *C.* had not an original cognisance of a felony committed in the county of *B.* yet these examinations and informations being transmitted into the county of *B.* where *A.* is indicted, may be read in evidence against him. *Dalt. Just. cap. 111. p. 299.* for tho he hath not an original jurisdiction of the cause, yet he hath a consequential jurisdiction thereof, having the party before him, and it is in order to the preservation of the peace.

If a justice of peace takes information in a case of high treason, it seems these cannot be read in evidence upon an indictment of treason, because high treason is not within that commission, but it is of use only, as an information upon oath, which they may take, tho they cannot proceed upon it; for all treason is a breach of the peace; *quære tamen*, if it be not allowable to be given in evidence.

CHAPTER XXXIX.

CONCERNING EVIDENCES REQUISITE, OR ALLOWED BY ACTS OF PARLIAMENT, AND PRESUMPTIVE EVIDENCE.

By the statutes of 1 *E. 6. cap. 12.* 5 *E. 6. cap. 12.* there ought to be two witnesses to an indictment of high treason, and these witnesses are to be sworn before the jury also upon his trial, unless he willingly without violence confess the same.

These two witnesses are still required upon his indictment, and it is not altered by the statute of 1 & 2 *P. & M. cap. 10.* which restores the common law trial, but extends not to the indictment. *Co. P. C. cap. 2. p. 25. vide supra, Part I. p. 298.*

A confession upon examination before a competent judge before indictment is such a confession, as the statute allows. *Co. P. C. ubi supra*, and so it was agreed in the case of *Tonge* and others, 14 *Car. 2. (a)*

If one witness be positive, and the other witness is only by hearsay, these are not two lawful accusers within the statute, agreed by all the justices in the lord *Lumley's* case [287] *Hill. 14 Eliz. cited Co. P. C. ubi supra* against the opinion in *Dy. 99. b. Thomas's* case; but two witnesses are not requisite either upon the indictment or trial of treasons for counterfeiting money by the express proviso of the statute of 1 & 2 *P. & M. cap. 11.* which directs, that in all treasons for counterfeiting or impairing of coin the offenders shall be indicted, arraigned, tried, convicted and attaint by such evidence, and in such manner as was used before. 1 *E. 6.*

The words of the statute 5 & 6 *E. 6. cap. 11.* are, "That no person shall be indicted, convicted, or attaint for any the treasons aforesaid, or for any other treasons, that now be, or hereafter shall be, which shall hereafter be perpetrated, committed or done, unless the same offender be thereof accused by two lawful accusers, &c." It may be considerable, whether this act extends to treasons *de novo* made by act of parliament after 5 & 6 *E. 6. (b)*

If such new treasons be enacted after, as that of 5 *Eliz. cap. 11.* and 18 *Eliz. cap. 1.* concerning clipping and washing of coin, and also 1 *Mar. cap. 6.* which have this expression (*being thereof lawfully convict or attaint, according to the due order and course of the laws of this realm shall suffer death, &c.*) there seems to be no necessity of two witnesses upon the in-

(a) *Kel. 18. vide Part I. p. 304.*

(b) See *Kel. 9, 18, 49. vide Part I. p. 297.*

dictment or trial. 1. Because, *according to the due order and course of the laws* seems to intend common law.(c) 2. But if there were doubt of that, yet in these acts concerning coin the statute of 1 & 2 P. & M. cap. 11. enacts, "That all offenses concerning counterfeiting, forging, or impairing any coin current within the realm, shall be indicted, arraigned, tried, convicted and attaind by such evidence, and in such manner, as hath been used before the first year of E. 6." therefore, if the statute of E. 6. should be construed to refer to any future statute making treason, there will be the same reason to carry over the statute of 1 & 2 P. & M. cap. 11. to the treasons enacted against impairing of coin by 5 & 18 Eliz.

But yet, as to other treasons, it may be very questionable, whether 5 & 6 E. 6. doth as to this point [288] extend to treasons newly enacted after, 1. Because tho a former act may direct the proceedings upon a new offense made after, (as the statutes of 18 Eliz. cap. 5. 31 Eliz. cap. 5. concerning informers, 21 Jac. cap. 4. concerning suing informations in the proper county, and pleading the general issue,) yet this doth not *in terminis* extend to offenses to be committed against statutes to be made, but only in all other treasons hereafter to be committed.(d) 2. Because most commonly in the acts, that after 5 & 6 E. 6. enacted new treasons, if the parliament intended two lawful witnesses, it most commonly expresseth it accordingly; *quære*, for 1 & 2 P. & M. cap. 11. seems to import, that in new treasons concerning counterfeiting foreign coin made current by proclamation, there would have been a necessity of two witnesses by the statute of 5 & 6 E. 6. and therefore provides against it.

By the statute of 21 Jac. cap. 27. the mother of a bastard child concealing its death shall suffer as in murder, unless she prove by one witness, that the child was born dead; this statute stands yet continued among many others by a clause in the latter end of the act for relief of the northern army. 16 Car. 1. cap. 4.(*) until by parliament it be otherwise enacted.

(c) I cannot see why these general words should be confined only to the *common law*, since the *laws* in the plural number do as fully express, and seem most naturally to include all the laws of the land, whether *common* or *statute*.

(d) The statute of 5 & 6 E. 6. seems *expressly & in terminis* to extend to treasons, which should be afterwards enacted; what else can be the meaning of the words, *any other treasons, that now be, or hereafter shall be*? for these words cannot reasonably be intended only of offenses hereafter to be committed, because that is provided for by the other words immediately following, *which shall hereafter be perpetrated, committed or done*: but to obviate all doubts, it is since provided by 7 W. 3. cap. 3. "That in all cases of high treason, whereby any corruption of blood shall ensue, no person shall be indicted, tried or attaind, but upon the oaths of two lawful witnesses."

(*) Vide 3 Car. 1. cap. 5. §. 22. *in fine*.

The indictment to put the prisoner to this proof by one witness, that the child was dead born, must contain this special matter, that the prisoner was delivered of a child, which by the laws of the kingdom was a bastard, and that it was born alive, and shew how she killed it.

But the indictment need not allege, that she concealed it, but it must be proved upon evidence, (d) if advantage be taken of this statute against her.

The indictment doth not conclude *contra formam statuti*, for the statute only directs the evidence, where the case is within it, but created not a new crime. (e)

If there be no concealment proved, yet it is left to the jury to inquire, whether she murdered it or not, by those circumstances that occur in the case, as if it be wounded or hurt, &c. but it doth not put her upon an absolute necessity of proving it born alive by one witness, and so the evidence stands but as at common law.

If upon the view of the child it be testified by one witness by apparent probabilities, that the child was not come to its *debitum partus tempus*, as if it have no hair or nails, or other circumstances, this I have always taken to be a proof by one witness, that the child was born dead, so as to leave it nevertheless to the jury, as upon a common law evidence, whether she were guilty of the death of it or not.

In some cases presumptive evidences go far to prove a person guilty, tho' there be no express proof of the fact to be committed by him, but then it must be very warily pressed, for it is better five guilty persons should escape unpunished, than one innocent person should die. [1]

(d) If no intent to conceal, it is not murder within the statute, tho' no body were present at the time of the delivery. *Kelc* 33.

(e) See *Ann Davis's case*, *Kel.* 32.

[1] Presumptive, or (as it is usually termed) circumstantial evidence, is receivable in criminal as well as in civil cases: and indeed the necessity of admitting such evidence is more obvious in the former than in the latter; for, in criminal cases, the possibility of proving the matter charged in the pleading by direct and positive testimony is much more rare than in civil cases.

A presumption is, where some facts being proved, another follows as a natural or very probable conclusion from them, so as readily to gain assent from the mere probability of its having occurred, without further proof. The fact thus assented to is said to be presumed, that is, taken for granted until the contrary be proved by the opposite party; *stabitur presumptioni donec probetur in contrarium*. *Co. Lit.* 273. And it is adopted the more readily, in proportion to the difficulty of proving the fact by positive evidence, and to the obvious facility of disproving it or of proving facts inconsistent with it, if it really never occurred.

These presumptions are of three kinds; *violent* presumptions, where the facts and circumstances proved necessarily attend the fact presumed; *Gillb. Ex.* 157;

If a horse be stolen from *A.* and the same day *B.* be found upon him, it is a strong presumption that *B.* stole him, yet I do remember before a very learned and wary judge in such an instance *B.* was condemned and executed at Oxford assises, and

probable presumptions, where the facts and circumstances proved *usually* attend the fact presumed; 3 *Bl. Com.* 372; and *light* or *rash* presumptions, which, however, have no weight or validity at all. *Id.*; *Gill. Ev.* 157; *Co. Lit.* 6. b. If, upon an indictment for murder, it were proved that the deceased was murdered in a house, and that the defendant was immediately afterwards seen running out of it with a bloody sword in his hand; these facts raise a violent presumption that the defendant was the murderer; for the blood, the weapon, and the hasty flight, are all circumstances necessarily attending the fact presumed, namely, the murder. *Co. Lit.* 6. b.; *Staudf.* 179, a.; *Gill. Ev.* 157. So upon an indictment for stealing in a dwelling-house, if the defendant were apprehended a few yards from the outer door, with the stolen goods in his possession, it would be a violent presumption of his having stolen them; but if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, together with proof that they were actually stolen, would amount, not to a violent, but to a probable presumption merely; but, if the property were not found recently after the loss, as, for instance, not until sixteen months after, it would be but a light or rash presumption and entitled to no weight. *R. v. —*, 2 *C. & P.* 459. And if the prisoner give a reasonable account of the manner in which he became possessed of the goods this will so far rebut the presumption as to throw it upon the prosecutor to negative that account. *R. v. Crowhurst*, 1 *C. & P.* 370. Such presumption will, of course also vary according to the nature of the property stolen, and whether it be or be not likely to pass readily from hand to hand. See *R. v. Partridge*, 7 *C. & P.* 551. So upon an indictment for arson, proof that property, which was in the house at the time it was burnt was afterwards found in the possession of the defendant, raises a probable presumption that the defendant was present and concerned in the arson. See *R. v. Rickman*, 2 *East*, *P. C.* 1035. Where, upon an indictment for perjury, in falsely taking the freeholder's oath in the name of *J. W.* at a parliamentary election, it was proved that the freeholder's oath was administered to a person who polled on the second day of the election by the name of *J. W.*; that there was no such person in fact as *J. W.*; that the defendant voted on the second day, though he was not a freeholder; that he did not vote in his own name or in any other than the name of *J. W.*; that there was but one false vote given on the second day's poll; and that the defendant some time afterwards boasted that he had *done the trick* and was not paid enough for the job and was afraid he should be *pulled up for his bad vote*; the court held that this was sufficient evidence for the jury to presume that the defendant voted in the name of *J. W.*, and consequently to find him guilty of the charge in the indictment. *R. v. Price*, 6 *East*, 323. Upon an indictment for disposing of and putting away a forged bank-note, knowing it to be forged, proof that the defendant has passed other forged notes raises a probable presumption that he knew the note, for the passing of which he is now indicted, to be forged; and if, in addition to this, it be proved that the defendant, when he passed these notes, gave a false name or address, it amounts to a violent presumption of his guilty knowledge. And the same upon indictments for uttering counterfeit money.

In addition to the presumptions which a jury may make from circumstantial evidence, there are also presumptions in law. Thus, in murder, the law presumes *malice* from the act of killing, until the contrary be proved by the defendant. *Fost.* 255; 1 *East*, *P. C.* 340. And the law also infers that every man must contemplate the necessary consequence of his own act. *R. v. Dixon*, 3 *M. & Sel.* 15. Thus, the uttering of a forged stock receipt to a person who employed the prisoner to purchase stock to that amount, and advanced the money, was holden sufficient evidence of an attempt to defraud, notwithstanding the belief of the party to whom

yet within two assises after *C.* being apprehended for another robbery and convicted, upon his judgment and execution, confessed he was the man that stole the horse, and being closely pursued desired *B.* a stranger to walk his horse for him, while he turned aside upon a necessary occasion and escaped; and *B.* was apprehended with the horse and died innocently.

I would never convict any person for stealing the [290] goods *cujusdam ignoti* merely because he would not give an account how he came by them, unless there were due proof made, that a felony was committed of these goods.

I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead, (f) for the sake of two cases, one mentioned in my lord *Coke's P. C. cap. 104. p. 232. a Warwickshire case. (g)*

Another that happened in my remembrance in *Staffordshire*,

(f) This was also a rule in the civil law. *Dig. Lib. XXIX. Tit. 5. §. 24.*

(g) That case was thus, An uncle, who had the bringing up of his niece, to whom he was heir at law, correcting her for some offence, she was heard to say, *Good uncle do not kill me*; after which time the child could not be found, whereupon the uncle was committed upon suspicion of murder, and admonished by the justices of assise to find out the child by the next assises, against which time he could not find her, but brought another child as like her in person and years as he could find and apparelled her like the true child, but on examination she was found not to be the true child: upon these presumptions he was found guilty and executed; but the truth was, the child being beaten ran away, and was received by a stranger, and afterwards, when she came of age to have her land, came and demanded it, and was directly proved to be the true child.

it was uttered, that the prisoner had no such intention. *R. v. Shepherd, R. & R. 169.* So, where a man was indicted under the repealed statute 43 G. III. c. 58, for setting fire to a mill, with intent to injure the occupiers, it was holden that the intent might be inferred from the act. *R. v. Farrington, R. & R. 207.* And upon an indictment for forgery, an intention to defraud the person who would have to pay the instrument if it were genuine, may be inferred, even though the instrument may be so framed as not to impose upon him, and the intention to defraud be general, and not confined or in any way pointed to the person by whom, if genuine, the instrument would be paid. *R. v. Masagora, R. & R. 291; Reg. v. Hill, 2 Mood. C. C. 30; 8 C. & P. 274.* Where a man has in possession a large quantity of counterfeit coin unaccounted for, it may be inferred that he procured it with intent to utter it, if there be no evidence that he was the maker. *R. v. Fuller, R. & R. 308.* So, in every case, intention can be but matter of presumption arising either from the facts stated in the indictment, or from extrinsic facts stated in evidence. See *ante*, p. 104.

It may also be necessary to observe, that the law presumes every man to be innocent, until the contrary be proved. *R. v. Teyning, 2 B. & Ald. 386; Sessions v. Dixon, 5 B. & C. 758.* It is also a maxim of law that "*omnia presumuntur rite et solemniter esse acta donec probetur in contrarium*"; upon which ground it will be presumed, even in a case of murder, that a man who has acted in a public capacity or situation was duly appointed. *R. v. Verelst, 3 Camp. 432; R. v. Gordon, 1 Leach, 315; Reg. v. Murphy, 8 C. & P. 297; Reg. v. Newton, 1 C. & K. 469.* See *Archbold Crim. Plead. & Ev. p. 122.*

where *A.* was long missing, and upon strong presumptions *B.* was supposed to have murdered him, and to have consumed him to ashes in an oven, that he should not be found, whereupon *B.* was indicted of murder, and convict and executed, and within one year after *A.* returned, being indeed sent beyond sea by *B.* against his will, and so, tho *B.* justly deserved death, yet he was really not guilty of that offense, for which he suffered.

But of all difficulties in evidence there are two sorts of crimes, that give the greatest difficulty, namely rapes and witchcraft, wherein many times persons are really guilty, yet such an evidence, as is satisfactory to prove it, can hardly be found; and on the other side persons really innocent may be entangled under such presumptions, that many times carry great probabilities of guilt. *Tutius semper est errare in acquietando quàm in puniendo, ex parte misericordie, quàm ex parte justitie.*

CHAPTER XL.

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CONCERNING VARIANCE BETWEEN THE INDICTMENT AND EVIDENCE, AND WHERE THE EVIDENCE PROVES THE INDICTMENT, AND WHERE NOT.

IF *A.* be indicted, that the first of *July 21 Car. 2.* he robbed or murdered *B.* and upon evidence it appears, that it was committed another day, or another year, either after or before the time laid in the indictment, yet this proves the issue for the king; only it is requisite, if there be an escheat in the case, and that the felony were committed after the day laid in the indictment, for the jury to find the day, because the relation of the escheat to avoid mesne grants and incumbrances relates to the time of the felony committed, 32 *Eliz. per omnes justic' Co. P. C. cap. 104. p. 230.*

If *A.* be indicted for a robbery or murder *apud A. in com'* *B.* if it were committed in another county, regularly he ought to be found *not guilty*, because regularly an offense of that nature in one county is not presentable out of the county where it was done, but tho it were done in another vill in the county of *B.* yet he is to be found guilty, for the vill is not material.

If the evidence in murder differ from the indictment *in specie mortis*, as if the indictment were for killing by poison, and the

evidence be of killing by stabbing, it doth not maintain the indictment. 9 *Co. Rep.* 67. *a. Mackally's case.*

But if the indictment were for poisoning with one kind of poison, and the proof be of another kind of poison, or the indictment be for killing with a sword, and the evidence be of killing with a staff, or with a gun, it maintains the indictment, for the common effectual word in both is *percussit*: vide 9 *Co. Rep.* 67. *a. Mackally's case. Co. P. C. cap. 62. p. 135. Sir Thomas Overbury's case. (a)*

And the same law holds in relation to the accessories. [292] saries to such principals, and with the same difference.

If *A. B.* and *C.* be indicted for the murder of *D.* and it is laid in the indictment, that *A.* gave him the stroke, whereof he died, and that *B.* and *C.* were *præsentes, auxilantes & abettantes*, tho upon the evidence it appears, that *B.* alone gave the stroke, whereof he died, and *A.* and *C.* were *præsentes, auxilantes & abettantes*, it maintains the indictment, for they are all principals; *Mackally's case, ubi supra. (b)*

If *A.* and *B.* be indicted of the murder of *C.* and upon the evidence it appears, that *A.* committed the fact, and *B.* was not present, but was accessory before the fact by commanding it, *B.* shall be discharged. 26 *H. 8. 5.*

If *A.* and *B.* be indicted as principal, and *C.* is indicted as accessory to both after the fact done, *A.* and *B.* are convicted, or only *A.* is convicted, and upon the evidence against *C.* it appears he was accessory only to *A.* it maintains the indictment. 9 *Co. Rep.* 119. *a. lord Sanchar's case per curiam. (c)*

A. is indicted for murdering *B. ex malitiâ præcogitatâ*, evidence of malice in law, as killing an officer or watchman in the execution of his office, or killing a man without any provocation maintains the indictment, because the law interprets it malice. 4 *Co. Rep.* 67. *b.*

A. is specially indicted upon the statute of 1 *Jac. cap. 8.* for stabbing *B.* not having a weapon drawn, nor stricken first, *contra formam statuti*, upon the evidence it appears, that the person kild struck first, yet it is good evidence to convict *A.* for manslaughter. *H. 23 Car. 1. Harwood's case. (d)*

So if *A.* be indicted for petit treason for killing his master *felonice, proditoriè, & ex malitiâ suâ præcogitatâ*, tho he were not his master, he may be found guilty of murder, *(e)* and tho it were not *ex malitiâ præcogitatâ*, he may be found guilty of

(a) *Stat. Tr. Vol. I. p. 118.*

(b) See 1 *Salk. 334, Wallis's case.*

(c) *Vide Part I. p. 624.*

(d) *Style 86.*

(e) *Vide Part I. p. 378. & postea, cap. 46. sub fine.*

manslaughter, and not guilty as to the petit treason; and so I have known it ruled oftentimes.

So if a man be indicted of burglary, and *quodd felonice & burglariter cepit bona, &c.* he may be acquit [293] of the burglary, and found guilty of simple felony, if the evidence riseth no higher.

So if a man be indicted of murder *ex malitiâ præogitatâ*, an evidence proving the killing upon a sudden falling out is a good evidence to prove him guilty of manslaughter, and the jury ought accordingly to find it. *Flow. Com.* 101. *a. Co. Lit.* 282. *a.* And so in an appeal.

CHAPTER XLI.

CONCERNING THE DEMEANOR OF THE JURY, AND HOW THEIR VERDICT IS TO BE GIVEN.

AFTER the arraignment of the prisoners, and their pleas of *not guilty* received and recorded, the sheriff returns the pannel of the jury, the prisoners are again called to the bar, and the jury being called, and appearing the prisoners are told by the clerk, that these good men now called and appearing are to pass upon their lives and deaths; therefore, if they will challenge any of them, they are to do it before they are sworn.

If no challenge hinder, the jury are commanded to look on the prisoners, and then severally twelve of them, neither more nor less, are sworn, *You shall well and truly try, and true deliverance make between our sovereign lord the king and the prisoners at the bar, whom you shall have in charge, [and true verdict give] according to your evidence. So help you God.*

After the jury sworn proclamation is to be made, "That if any can inform for our lord the king against the prisoners at the bar, let them come forth and they shall be heard;" then the prisoners are called successively to the bar, first *A.* and he is commanded to hold up his hand, the indictment [294] is repeated, "To this he hath pleaded *not guilty*, the issue is to try, whether he be guilty or not guilty; if you find him *guilty*, you shall say so, and inquire what goods or chattels, lands or tenements he had at the time of the felony or treason committed, or at any time after. And if you find him *not guilty*, you shall inquire, whether he did fly for it, and if you find, that he fled for it, you shall inquire of his goods and

chattels, and if you find him *not guilty*, and that he did not fly for it, you shall so and no more. Hear your evidence."

I have set down the clerk's charge to the jury, because it contains the effect of their inquiry.

Tho there be twenty prisoners at the bar for several felonies, and the oath is general to try between the king and the prisoners at the bar, yet the jury is to inquire of no more than what they are particularly charged with, as before; and therefore, tho twenty have pleaded, and stand at the bar when the jury is sworn, yet the court may stay at any number of the prisoners, and so the jury stand charged with no more than what are thus particularly charged upon them.

And when they go from the bar, and have brought in their verdict touching these particulars thus charged upon them, then, if the same jury pass upon the remaining prisoners, yet they are to be called over again, the prisoners reminded of their challenges, and the jury sworn *de novo* upon the trial of the rest of the prisoners.

For in law the jury is charged with no more than those, that have their indictments and plea of *not guilty*, and evidence concluded against and for them before the jury, tho possibly all the prisoners, that have pleaded, stood at the bar, when the jury was first sworn; and this is the constant course at *Newgate*,

By the antient law, if the jury sworn had been once particularly charged with a prisoner, as before is shewed, it was commonly held they must give up their verdict, and they could not

be discharged before their verdict given up, and so is [295] my lord *Coke*, *P. C. cap. 47. p. 110.* and this is the reason given 22 *E. 3. Coron. 449.* why after the plea

of *not guilty*, and the inquest charged, the prisoner cannot become an approver, because the inquest shall not be discharged; but the book at large, viz. 21 *E. 3. 18. a.* mentions not the charging of the inquest, but the plea of *not guilty* and the jury at the bar. *Co. Lit. 227. b.* But yet the contrary course hath for a long time obtained at *Newgate*, and nothing is more ordinary than after the jury sworn, and charged with a prisoner, and evidence given, yet if it appear to the court, that some of the evidence is kept back, or taken off, or that there may be a fuller discovery, and the offense notorious, as murder or burglary, and that the evidence, tho not sufficient to convict the prisoner, yet gives the court a great and strong suspicion of his guilt, the court may discharge the jury of the prisoner, and remit him to the gaol for farther evidence, and accordingly it hath been practised in most circuits of *England*, (a) for other-

(a) And so it was practised in *Whitebread's* case in treason, see *State Tr. Vol. II. p. 710, 827.* See also *Kel. 47, 52.* But the reason given for this practise, if

wise many notorious murders or burglaries may pass unpunished by the acquittal of a person probably guilty, where the full evidence is not searched out or given.[1]

If after the jury sworn and departed from the bar, one of them, *viz.* *A.* wilfully goes out of town, whereby only eleven remain, these eleven cannot give any verdict without the twelfth, but the twelfth shall be fined for his contempt, and that jury may be discharged, and a new jury sworn, and new evidence given, and the verdict taken of the new jury, [296.] and thus it was done by good advice at the gaol-delivery at *Hertford Aug. 15. Car. 1.* in the case of *Hanscom* the departing jurymen.

And so it is usual at the gaol-delivery at *Newgate*, if a jury be charged with several prisoners, and the court finds by probable circumstances, that the jury is partial to one of the prisoners, the court may discharge the jury of that prisoner, and put him upon his trial by another jury, and this is used also in other circuits. (*)

Upon *not guilty* pleaded twelve are sworn to try the issue, after their departure *A.* one of the twelve leaves his companions, which being discovered to the court, by consent of all parties *B.* another of the pannel is sworn in the place of *A.* and afterwards *A.* returns to his company, which being made known to the court, *A.* is called and examined why he departed, he answered to drink, and being examined, whether he had spoken with the defendant, denied it upon his oath, whereupon *B.* was discharged from giving any verdict, and the verdict taken of *A.* and the other eleven, and *A.* fined for his contempt, 34 *E. 3. Office de Court* 12. in trespass.[2]

it were law, (which yet without the prisoner's consent is unwarranted by antient usage; *vide* 3 *Co. Inst.* 110. *Co. Lit.* 227. b. 1 *And.* 103. *Raym.* 84. *State Tr. Vol. II. p. 951.*) seems to hold as strongly in behalf of the prisoner as of the king. *State Tr. Vol. IV. p. 190.* and yet I do not find any instance, where a jury once sworn was ever discharged, because the prisoner's evidence was not ready; on the contrary in lord *Russell's* case, the court refused to put off the trial only till the afternoon of the same day, pretending they could not do it without the consent of the attorney general, altho in that case the jury were not sworn, and the prisoner urged, that he had witnesses, who could not be in town till night, in which case it was certainly in the discretion of the court to put it off or not. *State Tr. Vol. III. p. 630, 631.* It hath however been since holden for law, that a jury once charged in a capital case cannot be discharged, till they have given their verdict, and the case of *Whitebread* was thought a very extraordinary one. See lord *Delamere's* case, *State Tr. Vol. IV. p. 232.* and *Rookwood's* case, *State Tr. Vol. IV. p. 659, 661.* and *Cook's* case, *State Tr. Vol. IV. p. 751.* *Foster* 16, 39, 76, 328.

(*) *Quare de hoc.*

[1] See *Foster*, 22, 30.

[2] In *R. v. Gould, Mich. T. 4 Geo. III.* the defendant was indicted for murder. The jury were sworn, and part of the evidence given; but before the trial was

If thirteen are by mistake sworn, the swearing of the last of the thirteen is void, and the other twelve shall serve.

If only eleven be sworn by mistake, no verdict can be taken of the eleven, and if it be, it is error; and so in a presentment, but if twelve be recorded sworn, no averment lies, that one was unsworn. *Lamb's Justice* 395.

The justices at common law may upon a just cause remove a juror, after he is sworn. 20 H. 6. 5. a.

When the jurors depart from the bar, a bailiff ought to be sworn to keep them together, [3] and not to suffer any to speak with them.

After their departure they may desire to hear one of the

over, one of the jurymen was taken ill, went out of the court, with the judge's leave, and presently after died. The judge doubting whether he could swear another jury, discharged the eleven, and left the prisoner in gaol. The court was moved for a writ of *habeas corpus* to bring up the prisoner, that he might be discharged, having been once put upon his trial. This being a new case, the court said they would advise with the other judges upon it; and afterwards, they all agreed that the prisoner might be tried at the next assizes, or the judge might have ordered a new jury to have been sworn immediately. The prisoner was tried accordingly at the next assizes, and acquitted on evidence. 3 Burn, 974.

If a juror be taken ill during the trial of the prisoner for felony, the jury may be discharged, and the remaining eleven, together with a new juror, re-sworn to try the prisoner. During the trial of Ann Sealbert, before Lawrence, J. for murder, one of the jury was seized with a fit, and was carried out of the court in an insensible state. The judge waited some time in hope that the juror might recover; but at length one of the jury, who came from the same neighbourhood, requested permission of the court to go to the public-house to which the sick man had been taken, to inquire into his situation, and he was suffered to go, accompanied by a bailiff, who was sworn to attend him. Upon his return he was sworn, "true answers to make to such questions as should be demanded of him;" and he then deposed that, from what he had seen of his fellow-juror, and from what he knew of the state of his health, he did not think that he would be able to attend that trial immediately. Mr. J. Lawrence thereupon (after reading from a MS. book of Mr. Justice Buller, the case of Jones, otherwise Horner, where a jury, on account of the intoxication of one of the jurors, had been discharged,) discharged this jury, and ordered another jury to be sworn; and all the other eleven jurors served upon the second pannel. 2 Leach, 706. If a jurymen be taken so ill as to be incapable of attending through the trial, another jurymen returned in the pannel may be added to the eleven, but the prisoner should be offered his challenges over again as to the eleven, the eleven should be sworn *de novo*, and the trial begin again. *R. v. Edwards*, R. & R. 224; 3 Camp. 207; 4 Taunt. 309.

[3] It is a general rule, that where the jury are permitted to separate, in cases of felony, after the opening of the evidence, the verdict will be set aside. *Com. v. McCall*, 1 Virg. Ca. 271; *Overbee v. Com.* 1 Robin. 756; *McLain v. State*, 9 Yerg. 241; 18 Johns. 218; but see *McCarier v. Com.* 11 Leigh, 633; *Martin v. Com.* id. 745; *Tovel v. Com.* id. 714; *Kennedy v. Com.* 2 Virg. Ca. 510; *People v. Douglass*, 4 Cow. 26; *Horton v. Horton*, 2 id. 589; *Oliver v. Trustees*, 5 id. 284; *People v. Ransom*, 17 Wend. 423; *People v. Beebe*, 5 Hill. 32; *State v. Prescott*, 7 N. Hamp. 290; *State v. Babcock*, 1 Conn. 401; *State v. Miller*, 1 Dev. & Bat. 500; *Wyatt v. State*, 1 Blackf. 25; *Com. v. Roby*, 12 Pick. 496; *State v. McKee*, 1 Bailey, 651.

witnesses again, and it shall be granted, so he deliver his testimony in open court, and also they may desire to propound questions to the court for their satisfaction, and it shall be granted, so it be in open court.

The jury must be kept together without meat, drink, fire, or candle, till they are agreed.[4] 24 E. 3. [297] 75.(b) Co. Lit. 227. b.

If they agree not before the departure of the justices of goal-delivery into another county, the sheriff must send them along in carts, and the judge may take and record their verdict in a foreign county; *quare*, whether in such cases the session may be adjourned before the verdict taken. 19 Assiz. 6. *per Scot.* 41 Assiz. 11.

If there be eleven agreed, and but one dissenting, who says he will rather die in prison, yet the verdict shall not be taken by eleven, no nor yet the refuser fined or imprisond, and therefore where such a verdict was taken by eleven and the twelfth fined and imprisond, it was upon great advice ruled the verdict was void, and the twelfth man deliverd, and a new *venire* awarded. 41 Assiz. 11. for men are not to be forced to give their verdict against their judgment;(c) *vide P. 20 E. 1. Rot. 43. Norf. coram rege.*

In capital causes, whether upon indictment or appeal, no

(b) *N. Edit. of year books 24. a.*

(c) But is it not a force, when any of the jurors are obliged to comply under the peril of being starved to death, for how can it be expected, that twelve considering men should in all cases happen to be of the same sentiments? and therefore antiently it was not necessary, (at least in civil causes,) that all the twelve should agree, but in case of a difference among the jury, the method was to separate one part from the other, and then to examine each of them as to the reasons of their differing in opinion, and if after such examination both sides persisted in their former opinions, the court caused both verdicts to be fully and distinctly recorded, and then judgment was given *ex dicto majoris partis juratorum*; thus in a great assise upon a writ of right between the abbot of Kirkstede and Edmund de Eyncourt eleven of the jury found for the abbot, and one for Edmund de Eyncourt, in this case the verdict of the eleven was first recorded, Robertus de Harblinge & omnes alii præter Radulphum filium Simonis dicunt super sacramentum suum, &c. and then follows the dictum of the twelfth Et prædictus Radulphus filius Simonis dicit super sacramentum suum, &c. then follows the judgment, Sed quia prædicti undecim concorditer & precise dicunt,

[4] See Doc. & Stu. 158; R. v. Stone, 6 T. R. 527; R. v. Kenner, 2 B. & Ald. 462; Everett v. Youells, 4 B. & Ad. 681; R. v. Woolf, 1 Chit. R. 401; Com. v. Cook, 6 S. & R. 577; Com. v. Clue, 3 Rawls. 498; Perrinton v. Humphreys, 6 Greenl. 379; Harrison v. Rowan, 4 Wash. C. C. R. 32; U. S. v. Haskell, id. 402; Com. v. Purchase, 2 Pick. 521; People v. Goodwin, 18 Johns. 187; Moore v. State, 1 Walk. 134; U. S. v. Gibert, 2 Sumn. 19; U. S. v. Coolidge, 2 Gal. 364; U. S. v. Shoemaker, 2 McLean, 114; People v. Olcott, 2 Johns. 301; Speir's case, 1 Dev. 49; State v. Ephraim, 2 Dev. & Bat. 162; Mahela v. State, 10 Yerg. 532.

verdict can be given by default in the absence of the party. 16 *Assiz.* 13.

[299] But if the prisoner hath pleaded to the country, and when he is to be tried will say nothing, yet no

quod predictus abbas & ecclesia sua predicta majus jus habeant tenendi &c. ideo consideratum est, quod predictus abbas & successores sui teneant predicta tenementa de cetero in perpetuum, &c. Placita coram justic' itinerant' in com' Lincoln anno 56 Hen. 3. Rot. 29. in dorso.

In an assise of novel disseisin between *William Tristram* plaintiff, and *John Simenel* and others defendants, where the whole jury consisted of only eleven, ten found for *Tristram*, and one for *Simenel*, and both verdicts are recorded in this manner, *Decem jurati dicunt, quod, &c. & undecimus juratorum, scilicet Johannes Kineth dicit, &c. Et, quia dicto majoris partis juratorum standum est, quod predictus Willielmus recuperet seisinam suam de predictis tenementis versus predictos Johannem & alios per visum recognitorum & dampna que taxantur per jur' ad duas marcas & Johannes & alii in misericordia. Pas. 14 E. 1. Rot. 10. coram Rege.*

The like practice is supposed in the case here quoted by the author. *Pas. 20 E. 1. Rot. 43. coram rege*, which was thus, *Martin Fitz-Osbert* recovered seisin of certain lands, &c. in *West-Somerton* against the prior of *Buttelye* before *John de Lovetot* and *William de Pageham*, judges of assise in *Norfolk* anno 16 E. 1. The prior afterwards complained greatly, that injustice had been done him by *Lovetot* at the said assise, and thereupon the bishop of *Winchester* and others were ordered to hear the matter and do justice to the prior. Upon this *Lovetot* and *Pageham* were called before the said bishop, &c. and the prior objected to *Lovetot*, "*Quod fieri fecit falsam irrotationem in rotulis suis, & contrariam veredicto juratorum assise predictæ, & hoc paratus est verificare per predictos juratores, qui omnes sunt superstites, &c.*" To which *Lovetot* and *Pageham* replied by justifying themselves, and insisting, "*Quod bene & ritè processerunt ad captionem illius assise, unde vocant recordum rotulorum suorum, &c.*" in which the judgment pronounced by *Lovetot* was entered in the following manner, "*Et quia per predictum assisam convictum [compertum] fuit, quod Edricus, de quo predictus Martinus exivit, fuit liber homo & libere conditionis; & quamvis ipse Edricus, & exitus de ipso, proveniens tenuissent de predicto Priore & de predecessoris suis, tenementa sua in villenagio, and per villana servitia, hoc eis non præjudicat, quò minus corpora sua sint libera; eo quod nulla præscriptio temporis potest liberum sanguinem in servitutem reducere, ideo consideratum est, quod predictus Martinus recuperet inde seisinam suam; &c. Et Johannes de Pykering unus recognitorum præfatæ assise pro eo quod in veredicto præfatæ assise, narrando illud veredictum, contrarius fuit omnibus aliis recognitoribus, narrando aliud quam inter illos fuit provisum, sicut per examinationem eorum convictum [compertum] fuit, & manucaptus est per, &c. ideo ipse & manucaptos sui in misericordia. Et præceptum est vic', quod apud predictum J. de Pykering, & salvo, &c. ita quod habeat corpus ejus apud *Kentford*, &c. ad faciendam redemptionem suam pro transgressionem predictam.*" The bishop of *Wynton* and his fellows then proceeded to examine *Lovetot* and *Pageham* touching the said judgment. "*Et quia in consideratione super veredicto primæ assise compertum est, quod J. de Pykering unus recognitorum predictæ assise, narrando illud veredictum, contrarius fuit omnibus aliis recognitoribus, narrando aliud quam inter eos fuit provisum; & nichil de illo contrario in recordo predicto specificatur sive declaratur; immo quod veredictum captum fuit & receptum, ac si omnes de uno & de eodem assensu fuissent in veredicto predicto; nec etiam veredictum ipsorum undecim declaratur sive specificatur, &c. nec duodecimus ab undecim fuit separatus, nec examinatus per se; nec undecim a duodecimo fuerunt separati, nec per se examinati &c. prout moris est in tali casu; & sic ex contrario veredictum subsecutum fuit judicio non legi sive consuetudini regni consonum, videtur manifestè quod recordum illud non est ple-*

penance shall be inflicted, but the jury shall be taken. 15 *E.* 4. 33. *b.*

Now touching the giving up of their verdict, if the jury say they are agreed, the court may examine them by poll, and if in truth they are not agreed, they are fineable. 29 *Assiz.* 27. 40 *Assiz.* 10.

num, seu perfectum, in hoc casu, &c. Concordatum est quoddam assisa predicta re-examinatur, &c." Upon this the sheriff was ordered, quod venire faciat hic &c. recognitores assise predictæ, & quod scire faciat *Martin* to appear at the same day ad audiendum, &c. "Postea ad predictum diem venerunt recognitores assise predictæ. Et quia predicti *Johannes & Willielmus* aliud recordati fuerunt, quam compertum fuit per recordum rotulorum ipsius *Johannis*; & etiam quia juratores predicti minus sufficienter fuerunt examinati super articulis predictis, sicut patet in recordo predicto, iteratim fuerunt juratores jurati, & examinati; qui dicunt super sacramentum suum, quoddam predictus *Martinus* fuit villanus ipsius Prioris die quo ejectus fuit de predictis tenementis, &c. Et quia compertum est, &c. & quoddam Prior ad predictam assisam coram prefatis *J. & W.* respondebat per ballivum suum, qui quidem ballivus non potuit deducere in iudicium jus sanguinis nativi domini sui absque presentia domini sui, &c. ac etiam in supradicto recordo quoddam nulla prescriptio longi temporis potest liberum sanguinem in servitutem reducere, quoddam omnino falsum est, &c. videtur, quoddam iudicium *J. de Lovetot* erroneum est; ideo consideratum est, quoddam predictus Prior reabeat predicta tenementa, ita quoddam omnia sint in eodem statu, in quo fuerant ante captionem predictæ assise." Afterwards by writ of error the record coram episcopo *Wynton* and sociis suis auditoribus querelarum was brought coram rege, and *Martin Fitz-Osbert* assigned for error, that he had recovered seisin against the said Prior "in grosso veredicto super disseisinâ secundum legem communem; & auditores sine brevi regis inde eis directo, & sine aliqua præmunitione ipso *Martino* rite factâ, contra legem communem, ipsum a predicto tenemento abjudicaverunt, & contra tenorem Magnæ Cartæ domini regis: Dicit insuper, quoddam predicti auditores venire fecerunt coram eis juratores prefatæ assise in formâ certificationis, & ipsos juratores per sacramentum suum reexaminaverunt & admiserunt veredictum eorum contrarium veredicto per ipsos prius pronuntiato; unde dicit, quoddam in hiis & aliis erratum est, &c." To this the prior replied, that the said *Martin* had been "Præmunitus per breve, quod vocatus scire facias; & quoddam predicti auditores habuerunt plenam potestatem, tam per breve domini regis, quam per speciale præceptum domini regis, ad corrigenda recorda justiciariorum vitiosa & erronea inventa & hoc satis constat domino regi & ipsius consilio, & quoddam predictus *Martinus* non recuperavit per grossum veredictum; quia non fuit ibi veredictum nisi tale, quale imperfectum, quia per xi juratores captum; & quoddam predicti auditores non admiserunt contrarium veredictum priori veredicto, quia veredictum prius captum coram *J. de Lovetot* fuit tale, quale imperfectum, & contra legem terre captum per xi juratores, de statu sanguinis ultra tempus limitatum; secundum veredictum magis deberet dici suppletio prioris veredicti defectivi, quam eidem contrariari." To which *Martin* rejoined, and insisted, "Quoddam predicta assisa fuit plena & perfecta coram *J. de Lovetot* & sociis suis justis capta, & hoc liquat expressè in eodem recordo, ubi dicit *Jurati dicunt*, &c. Et quoddam ipse recuperavit predicta tenementa per grossum veredictum prefatæ assise, petit iudicium, si predictum grossum veredictum super disseisinâ præcisè factâ aliquo modo secundum legem & consuetudinem regni *Angliæ* debet adnichillari, absque brevi de attinctâ," &c.

The judgment in this case does not appear, but it should seem, that the reason why the record of the verdict is said to be imperfect was not, because all the twelve did not agree, but because the *dicta utriusque partis* were not distinctly specified and recorded, which is declared to be the usage in such case, *prout moris est in tali casu*.

If the jurors by mistake or partiality give their verdict in court, yet they may rectify their verdict before it is recorded, or by advice of the court go together again and consider better of it, and alter what they have delivered. [300]

Plow. Com. 211. *b. Saunder's case.*

But if the verdict be recorded, they cannot retract nor alter it. *Co. Lit.* 227. 7 *R.* 2. *Coron.* 108. 20 *Assiz.* 12. 5. *H.* 7. 22. *b.*

In a case of felony or treason the verdict must be given in open court, and no privy verdict can be given. *Co. Lit.* 227. *b. Co. P. C.* 110.

If a man be arraigned upon an inquest of murder or manslaughter taken by the coroner, and be found *not guilty*, the jury that acquits him ought to inquire, who committed the fact, and that shall serve as an indictment against that person, that the jury did find the fact.

But it is held, that if a man be arraigned upon an indictment found by the grand inquest, and be acquitted, the jury shall not make such further inquiry. 14 *H.* 7. 2. *b.* 13 *E.* 4. 3. *b.* 37. *H.* 8. *B. Coron.* 117: 11 *H.* 4. 93. *a. B. Coron.* 32. 21 *E.* 3. 17. *b. B. Coron.* 39.

But surely the antient law was otherwise, and that the jury that acquits, whether upon a presentment, or upon an indictment of homicide, shall be charged to say, who did the fact. 37 *Assiz.* 13.

So if a man be indicted *de morte cujusdum ignoti*, the inquest shall be charged to tell the name, if they can. 2 *E.* 3. *Coron.* 159.

A man is indicted of robbery and acquitted, but it appeared to the court, that a robbery was done, but the prisoner *not guilty*, and therefore upon the statute of *Winchester* the court compelled the jury to present who did it, for the hundred is to answer for the bodies of the offenders, and the book concludes generally, *Et tiel course tiendra, ou home est indite de mort de home & acquit* 3 *E.* 3. *Iter North. Coron.* 307. so that they made no difference, where the [indictment was by the grand inquest, or by the coroner's inquest.]

The same law in an appeal 22 *Assiz.* 39. *Coron.* 178. 4 *H.* 7. *Rot.* 21. *Rastal's Entries* 57. *a.*

But at this day the law and practice hath obtained, [301] that only upon an arraignment upon the coroner's inquest the jury, if they acquit the prisoner, shall inquire who did the murder or manslaughter, and commonly it is a business of form, for they usually say, if it be not known, that *John a-Nokes* did it. 37 *H.* 8. *B. Coron.* 32. 21 *E.* 3. 17. *b. B. Coron.* 39. *Dy.* 238. *b.*

And as to indictments of robbery, if the petit jury acquit the

prisoner, they do not inquire who did it, and the reason of the difference is, that for the most part in *Eyre* the petit jury were all of the same hundred, where the offense was committed, and then upon the statute of *Winton* the hundred were to answer *de corporibus malefactorum*, and therefore it was reason to put them upon the inquiry, who committed the robbery, if it appears to the court, that a robbery was committed, and the case of 3 E. 3. *Coron.* 307. was in *Eyre*, but now the jury, that tries, as well as inquires, is for the most part of the rest of the county, and therefore they answer only the point of *guilty* or *not guilty*: *vide Stamf. P. C.* 181. a.

The jurors of the petit inquest are charged to inquire if the party fled, and so of his goods and chattels, this is but an inquest of office, and traversable, [5] *vide supra Part I. cap.* 27. p. 362. But it hath been held, that a presentment of flight before the coroner *super visum corporis* is conclusive to the party, and not traversable: *vide quæ supra dixi, Part I. cap.* 31. p. 416, 417.

And therefore it is, that if the coroner's inquest *super visum corporis* present a *fugam fecit*, and the party be taken and arraigned, and pleads to that indictment, the jury shall not be charged to inquire of the *fugam fecit*, because found before by the coroner's inquest, and if they be charged therewith and acquit the prisoner, and likewise say, that he did not fly, yet the record of the inquisition before the coroner finding the flight shall take place to intitle the king. 3 E. 3. *Forfeiture* 35. P. 7 *Eliz. Dy.* 238. b.

The jury may find a special verdict, or may find the defendant guilty of part, and not guilty of the rest, or [302] may find the defendant guilty of the fact, but vary in the manner.

If a man be indicted of burglary, *quodd felonice & burglariter cepit & asportavit*, the jury may find him guilty of the simple felony, and acquit him of the burglary and the *burglariter*.

So if a man be indicted of robbery with putting the party in fear, the jury may find him guilty of the felony, but not guilty of the robbery.

The like where the indictment is *clàm & secretè à persona*.

So if a man be indicted upon the statute of 1 Jac. of stabbing *contra formam statuti*, the jury may acquit him upon the

[5] But now by the 7 & 8 Geo. IV. c. 28. s. 5, where any person shall be indicted for treason or felony, the jury empannelled to try such person shall not be charged to inquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony.

statute, and find him guilty of manslaughter at common law. 23 Car. 1. *Harwood's case*. (d)

So if a man be indicted of stealing of goods of the value of 10s. the jury may find him guilty only of goods to the value of 6d. and so guilty only of petit larceny. 41 E. 3. *Coron.* 451. *Stamf. P. C. L.* III. cap. 9. fol. 165. a.

So if a man be indicted of murder *ex malitia præcogitata*, the jury may find him guilty of manslaughter. *Co. Lit.* 282. a. or that he killed him *se defendendo*, or *per infortunium*; but *nota* in these cases it is not sufficient generally to find it done *se defendendo*, or *per infortunium*, but the special matter must be set down how it was done, and if upon the special matter shewn it shall appear to be murder or manslaughter, the court will accordingly judge of it, tho the jury conclude, *Et sic per infortunium*, or *sic se defendendo*. 3 E. 3. *Coron.* 284, 286, 287, & 43 *Assiz.* 31. *Coron.* 226.

And in these cases, tho it be found *per infortunium*, or *se defendendo* upon the special matter set forth, yet this special matter must be recorded, for tho it be not such a felony, as hath judgment of life, yet it is such an offense, as gives the forfeiture of goods, and therefore they may not find a general *not guilty*, but must find the special matter, and leave it to the court to judge.

At the sessions at *Newgate* 16 Car. 2. upon the evidence it appeared, that *A.* a boy riding in the street upon an horse, *B.* another boy whipt the horse, the horse ran away against the will of *A.* and ran over a child and kild it, for this *A.* was indicted of murder by the grand inquest, and the jury found him generally *not guilty*; the court was in doubt of receiving the verdict, because it was *per infortunium*, and so ought specially to be found, but because the coroner's inquest had found the special matter, and concluded it, as in truth it was, *per infortunium*, which presentment *A.* was ready to confess, that so he might have his pardon of course, the verdict of *not guilty* was recorded, and so it was said was the usual course in that case; but it was agreed, that if *A.* had of his own accord put the horse into speed, and he had so kild the child, it had not been *per infortunium* but manslaughter. *Richard Pretty's case* for killing *Anne Jones*.

But now suppose the prisoner kild the party, but yet in such a way as makes no felony, as if he were of *non sane memory*, or if a man kills a thief, that comes to rob him, or to commit a burglary, or if an officer in his own defense kills one, that as-

saults him in the execution of his office, which are neither felony nor forfeiture, whether is it necessary to find the special matter, or may the party be found *not guilty*? *Foster* 265.

And I think, and so I have known it constantly practised, the party in these cases may be found *not guilty*, and the jury need not find the special matter.

And the reason is, that in these cases there is neither felony nor forfeiture.

And this is in effect declared by the statute of 24 *H. 8. cap. 5.* "If any attempt to commit murder, robbery or burglary in or nigh any common high way, or in the mansion-house, &c. and the evil doer be slain, and if the same by verdict be found or tried, the slayer shall not lose any goods or chattels, but shall thereof be fully acquitted and discharged in like manner as he should be, if he were lawfully acquit of the death," and accordingly ruled in *Cooper's* case. *P. 15 Car. B. R. Croke, p. 544.*

But it is used in such cases (and prudently enough,) for the coroner's inquest to find the special matter, and [304] the bill of indictment of the grand jury to be for murder, and to have the party arraigned upon the bill of indictment, and to be acquitted thereupon upon trial, and to enter the acquittal upon the bill, and then to confess the coroner's presentment, and to have judgment also thereupon; thus it was done in the case of *Richardson* keeper of *Newgate*, who kild *Hyde*, that had committed a robbery and made resistance, that he could not be taken without being kild. *M. 25 Car. 2. at Newgate.*

And therefore, where a thief was kild in pursuit because of necessity, if the special matter be found, the killer shall have judgment, *quod eat sine die.* 22 *Assiz* 55. *Coron.* 179. 22 *E.* 3. *Coron.* 258. 26 *Assiz.* 23. *Coron.* 192. 22 *E.* 9. *Coron.* 261. and the reason is, because it is no felony, nor causeth any forfeiture so much as of goods, but is a justifiable act, and so differs from *se defendendo*, or *per infortunium*, which give a forfeiture of goods.

And since in an indictment or an appeal of felony the defendant cannot plead a justification, he shall have the advantage of it upon the general issue pleaded. 26 *H. 8. 5. b.* 37 *H. 8. B. Appeals* 122.

Yet *vide* 37 *H. 6. 20 & 21. per Needham* upon an indictment of murder the defendant may plead, that in an appeal before the constable and marshal of treason he being appellee kild the appellant; yet in that case it seems, if he pleaded *not guilty*, he shall have advantage of that special justification upon evidence.

But [notwithstanding] this, that I have said, where the matter itself appears not to be felony, the prisoner upon *not guilty* pleaded may be found *not guilty*, without finding the special matter, and accordingly ruled. *P. 15 Car. 1. Croke, p. 544.*

Yet if the coroner's inquest find not the special matter but murder or manslaughter, and the prisoner is arraigned upon it and plead *not guilty*, and upon the evidence it appear, that the prisoner kild the man, but in such a manner as [305] makes no felony, as a thief that assaults him upon the highway, or a thief that resists the arrest, in this case the jury cannot find a general *not guilty*, but must find, that the prisoner did it, and the manner how, and this is to be entred of record, as in case of a verdict *se defendendo*.

And the reason of the difference is, because in the former case the jury gives a verdict of *not guilty* generally, without inquiring who did the fact. But where a man is arraigned upon the coroner's inquest *super visum corporis*, and pleads *not guilty*, if the jury acquit the prisoner by *not guilty*, yet they must inquire who did it, for here it is apparent there was a man slain, because the coroner takes the inquest upon view of the body, and if they should find him generally *not guilty*, and yet should upon their other inquiry find he kild him, it would be a contradiction in itself, and therefore in this case, they are to find the special matter, and thereupon the court shall give judgment for his discharge.

Many special verdicts have been found, as upon the statute of stabbing, so upon the point, whether murder or not, but it is difficult to find them so that judgment may be given for murder, because there are so many circumstances required to be found, that if any be omitted, the verdict will fall only to manslaughter.

I have rarely known upon any special verdict, where the question was murder or manslaughter, judgment to be given for murder, (d) but commonly for manslaughter or *se defendendo*. *Tutius erratur ex parte mitiori.*

(d) There have been however several instances, wherein it has been done, viz. *Mackally's case*, 9 Co. Rep. 70. a. *Maugridge's case*, *Hill*, 5 Ann. B. R. Kel. 120. *Oneby's case*. Trin. 13 Geo. B. R. all which were special verdicts, and the court ruled them to be murder.

CHAPTER XLII.

CONCERNING THE MISDEMEANORS OF JURORS, AND THEIR PUNISHMENT.

If any of the jury eat or drink without license of the court before they have given up their verdict, they are fineable for it.

But tho it be not at the charges of either party, antiently it was held it would avoid the verdict. 24 E. 3. 24. a.

But at this day the law is settled, that it is only a misdemeanor fineable in them that do it, but avoids not the verdict. 14 H. 7. 29. b.(a) 20 H. 7. 3. a.

But if it be at the charge, for the purpose, of the prisoner, and the verdict find him guilty, the verdict is good; but if they find him *not guilty*, and this appears by examination, the judge, before whom the verdict is so given, may record the special matter, and thereupon the verdict shall be set aside, and a new trial awarded. 14 H. 7. 30. a. b.

If a juryman before he be sworn take information of the case, this is cause of challenge, as the law stands at this day, but antiently it was held otherwise, and that it was lawful, and that was the reason given in the statute of 6 H. 6. cap. 2. which enacts, "That pannels of assises be delivered by the sheriff to either party six days before the sessions, namely, that they might inform the jurors of their right before the session."

But this brought great inconvenience in embracery and tampering with jurors, and therefore it is justly disused and disapproved.

If a juryman have a piece of evidence in his pocket, and after the jury sworn and gone together he sheweth it to them, this is a misdemeanor fineable in the jury, but [307] it avoids not the verdict, tho the case appears upon examination.[1] M. 23 Car. 1. B. R. M. 40 & 41 Eliz. B. R.

(a) *Vide plus de ces cases* 15 H. 7. 1. b.

[1] It is said that the jury may give a verdict without testimony, when they themselves have a knowledge of the fact. *Tri. per Pais*, 279; 1 *Ventr.* 67. But if they give a verdict on their own knowledge, they ought to tell the court so; and the fair way is to tell the court before they are sworn, that they have evidence to give, when they may be sworn as witnesses. *Anon. Salk.* 405. But it is of dangerous consequence, to receive a verdict against evidence given, on supposal that some of the jury knew otherwise, or on private information given by any jurymen to the rest, when he cannot be cross-examined. *Tr. per Pais*, 209. Mr. Justice Buller said, that where a juryman had knowledge of any matter of evidence in a cause which he is trying, he ought not to repeat the same privately to the rest of

Croke, n. 1. Graves & Short; (b) vide tamen contra 11 H. 4. 18. a.

But if after the jury sworn either party deliver a piece of evidence to the jury, and the verdict is given for him that delivered it, it shall avoid the verdict, but then this must appear by examination, and be indorsed upon the *postea* or verdict, so as it appears of record, and it must not be barely by affidavit made after. *M. 40 & 41 Eliz. B. R. Graves & Short. Co. Lit. 227. b.*

But if the verdict be given against him that delivered the evidence, the verdict is good. *Ibid.*

If a piece of evidence under seal be read in court, the jury ought regularly to have it with them, but not if it be not under seal.

But yet if after the jury sworn a piece of evidence not under seal be by the court delivered to the jury, it doth not avoid the verdict, and so it is, if it be delivered by a mere stranger, or if it be delivered by one of the parties, and the verdict be given against him, on whose behalf it was delivered. *M. 37 & 38 Eliz. B. R. Croke, n. 1. (c)*

If after the jury sworn and gone from the bar they send for a witness to repeat his evidence, that he gave openly in court, who doth it accordingly, this appearing by examination in court and indorsed upon the record or *postea* will avoid the verdict. [2] *T. 32 Eliz. B. R. Croke, n. 17. Metcalfe & Deane. (d) M. 20 Jac. B. R. Hillord & Hall, (e) because not done openly in court, nor in the presence of the parties concerned. M. 32 Eliz. B. R. Leon, n. 426. Elme's case. (f)*

But if the jury after their departure from the bar desire to hear the testimony of a witness again, they may be sent for into court, and the witness may be heard again openly, where the court or parties may ask what questions they think fit.

If depositions are read in court to the jury, and after [308] the jury sworn and going from the bar the solicitor or prosecutor for the king or party without consent of parties or order of the court deliver the copies of the depositions to the jury, if they find against him on whose part the copies

(b) *Cro. Eliz.* 616.

(c) *Vicary & Farthing. Cro. Eliz.* 411.

(d) *Cro. Eliz.* 189.

(e) 2 *Roll. Rep.* 261, *Palm.* 325.

(f) 1 *Leon.* 305.

the jury, but should state to the court, that he had such knowledge, and thereupon be examined and subjected to cross-examination as a witness. 6 *How. St. Tr.* 1012, n. *R. v. Rosser*, 7 *C. & P.* 648.

[2] *Hudson v. State*, 9 *Yerg.* 468; *Perkins v. Knight*, 2 *N. Hamp.* 474; *Bennett v. Howard*, 2 *Day*, 223; *Knight v. Freeport*, 13 *Mass.* 218.

were deliverd, the verdict is good, but if they find for him on whose part they were deliverd, and this appear by examination, and be (as it ought to be) indorsed upon the *postea* or record, the verdict shall be quashed, and a new *venire facias*, or award for a new jury shall be returned. *M. 20 Jac. B. R. Hillord and Hall.*

If after the evidence given, where divers evidences are read on both sides, and the clerk is making up his bundle of evidences, that were under seal, to deliver to the jury, the solicitor for the plaintiffs delivers a bundle of depositions to the jury, some whereof were read, and some not read, and upon examination this appeared, tho the jury swore they opened not the bundle deliverd by the solicitor, yet the verdict for the plaintiff was for this cause avoided, (the matter being indorsed upon the record) and a new *venire facias* awarded, for great inconvenience may be by such a practice, and the oath of the jury, that never looked into them, was not regarded, for possibly it may be a misdemeanor in them to look into it, which they shall not excuse in this manner.[3] *T. 1653. Webb & Taylor, 2 R. A. 714. pl. 6.*

If the party after the jury sworn speak with a juryman, but nothing touching the business in issue, this doth not avoid the verdict given after for him. *M. 7. B. R. per curiam.*

But if he or any in his behalf say to a juryman after his departure from the bar and before verdict given, the case is clear for the plaintiff, this shall avoid the verdict, if given for the plaintiff, for it is new evidence. *H. 22 Jac. B. R. Athil & Bulwer* adjudged. *2 Rol. Abr. 716. pl. 20.*

If *A.* be challenged off, and twelve more sworn, yet *A.* goes along with the twelve sworn and is present at their consultation, if *A.* give no new evidence, nor advised or directed them to find that party, for whom the verdict is given, [309] the verdict is good, but *A.* shall be fined for his misdemeanor. *P. 17 Jac. B. R. Park's case.*

Now touching fining of jurors I shall add farther.

If a man, that is one of the indictors, be returned upon the petit jury, and do not challenge himself, he shall be fined. *40 Assiz. 10.*

If a jury say they are agreed, and it being asked, who shall

[3] See *R. v. Sutton*, 4 M. & S. 532; *Whitney v. Whitman*, 5 Mass. 405; *Purinton v. Humphreys*, 6 Greenl. 379; *Benson v. Fish*, id. 141; *Talmadge v. Northrop*, 1 Root, 522; *Price v. Warren*, 1 Harr. & Munf. 385; *Thompson v. Mallet*, 1 South. 146; *Jessup v. Eldridge*, Coxe, 401; and see *Hix v. Drury*, 5 Pick. 296; *Hackley v. Hastie*, 3 Johns. 252; *Sheaff v. Gray*, 2 Yeates, 273; *Lonsdale v. Brown*, 4 Wash. C. C. R. 148; *Alexander v. Jamieson*, 5 Binn. 238.

say for them, they say their foreman, but upon farther inquiry they are not agreed, the jury shall be fined, *viz.* every one apart. 40 *Assiz.* 10. 29 *Assiz.* 27.

If a juryman be called and refuse to appear, or if having appeared withdraw himself before he be sworn, the court may set a fine upon him at their discretion: *vide stat.* 35 *H.* 8. *cap.* 6.

So if he be challenged, and while the challenge is trying withdraw himself, and the challenge is upon the trial disallowd, and he be not present to be sworn 36 *H.* 6. 27. *a.* or being sworn withdraw himself from his fellows before the verdict given. 34 *E.* 3. *Office de court* 12.

If eleven of the jury be agreed, and the twelfth refuse, and make his companions lie by it, heretofore such juryman hath been imprisond for his wilfulness, 8 *Assiz.* 35. and fined, and the inquest taken by the other eleven jurors. 3 *E.* 3. *Verdict* 40.

But upon great consideration both these courses have been disallowd, and the judgment upon the verdict of eleven jurors reversed, and the juryman (fined and imprisond) discharged, as being contrary to law, for it may be the twelfth was in the right, yet howsoever his conscience is not in this manner to be forced, and therefore former precedents of this kind have been disallowd. 41 *E.* 3. 11. *a.* 41 *Assiz.* 11.

But what if a juror give a verdict against all reason, convicting or acquitting a person indicted against evidence, what shall be done? I say, if the jury will convict a man against or without evidence, and against the direction or opinion of the court, [4]

the court hath this salve to reprove the person convict [310] before judgment, and to acquaint the king, and certify for his pardon.

And as to an acquittal of a person against full evidence it is likewise certain the court may send them back again, and so in the former case, to consider better of it before they record the verdict, but if they are peremptory in it, and stand to their verdict, the court must take their verdict and record it, but may respite judgment upon the acquittal.

But as touching punishing the jury, I shall say, what I think may be done, and what may not be done.

[4] Whenever the finding of the jury is in point of law against the charge of the judge, the verdict, except in cases of acquittal, will be set aside. *Watkins v. Oliver*, Cro. Jac. 558; *Bright v. Egnon*, Burr. 390; *Edie v. East Ind. Co.* id. 1216; *Hodgson v. Richardson*, 1 T. R. 167; *Tindal v. Brown*, 1 W. Bl. 463; *Farrant v. Olmins*, 3 B. & Adol. 693; *Turner v. Meymott*, 1 Bing. 158; *Gibbons v. Phillips*, 8 B. & C. 487; *Pierce v. Woodward*, 6 Pick. 172; *Payne v. Trevesant*, 2 Bay, 23; *Hine v. Robbins*, 8 Conn. 342; *Dillingham v. Snow*, 5 Mass. 547; *Cunningham Magown*, 18 Pick. 13; *Hall v. Downs*, Brayt. 168; *U. S. v. Duval*, Gilpin, 356; *Ross v. Eason*, 1 Yeates, 14; *Bank v. Marchand*, Charlt. 247; *Moore v. Cherry*, 1 Bay, 269; *Thomas v. Brown*, 1 McCord, 557; *Moore v. Moore*, 3 id. 282.

1. I think in such a case the king may have an attaint, for altho a man convicted upon an indictment can have no attaint, because the guilt is affirmed by two inquests, the grand inquest, that presents the offense upon their oaths, and the petit jury, that agrees with them, yet where the petit jury acquits, they stand as a single verdict, for they disaffirm what the grand inquest of twelve men have upon their oaths presented, and with this agrees the book 10 H. 4. *Attaint* 60, 64. *per Thorn*.

2. By the statute of 26 H. 8. *cap.* 4. the justiciar or steward, before whom any person is acquit of felony against pregnant evidence in *Wales* or the marches thereof, may bind over the jurors to appear before the president and council of the marches of *Wales*, who may, as they see cause, fine and imprison such jurors by their discretion.

3. I do confess in the king's bench there have been many precedents of jurors, that have acquitted persons of murder, or other felony tried in that court, if they have gone against pregnant evidence, that have been fined, imprisoned and bound to their good behaviour during their lives. (g)

The like hath been done before justices in *Eyre*, and the court of king's bench is a court in *Eyre* and much more, for that court may reverse judgment given in *Eyre*. See for this purpose *T. 43 Eliz. B. R. Rot.* 979. *Noy's Rep.* p. 48 & 49. *Wharton's* case, where the jury in the king's bench acquitting the prisoner of murder against pregnant evidence, and finding it only manslaughter were fined 20*l.* apiece, bound to the good behaviour and for the good behaviour of the prisoner, [311] and committed, and this was done by the advice of all the judges. See the same case *M. 44 & 45 Eliz. B. R. Yelv. Rep.* p. 23.

M. 42 & 43 Eliz. B. R. Croke, n. 12. p. 778. Wats & Braines. In an appeal of murder there was a confederacy among the jury to bring in the verdict *not guilty*, and if the court disliked it, then to change their verdict, and accordingly they did, and the court disliking their verdict they went out and found him guilty, and this agreement being discovered, the principal confederates were fined and imprisoned, but this fine was for their confederacy and practice, not for their verdict. [5]

(g) *Vide supra* p. 159.

[5] If the jury cast lots for their verdict, it shall be set aside, and they shall be fined for the contempt. 3 *Keble* 805; *R. v. Fitzwater*, 2 *Lee* 140; *Foster v. Hawden*, *id.* 205. The jury having sat up all night, agreed in the morning to put two papers into a hat, marked *plaintiff & defendant*, and so draw lots; *plaintiff* came out, and they found for the plaintiff, which happened to be according to the

7 *R. 2. Coron.* 108. The jury acquitted a notorious robber in the king's bench against great evidence, and the court bound the jury for the good behaviour of the prisoner; the reporter makes a *quære per quel ley*, vide the notes annexed to *Benloe* 153. to the same purpose.

4. Again, in cases of inquest of office there have been precedents in the *Exchequer*, and more frequent in the court of wards for fining of jurors, that would not find according to their evidence. *H. 28 Eliz. in Scaccario coram Thess. & baronibus.* 3 *Hughes* 196.

5. The practice of the king's bench to fine jurors for finding verdicts contrary to their evidence was endeavouring to be brought in practice before judges of *nisi prius*; and about 14 *Car. 2.* in an *Oxfordshire* case *Huntingdon* and his eleven companions jurors were fined 5*l.* apiece for such a verdict, and the fine estreated into the *Exchequer*, but by the whole court by the advice of the greater part of the rest of the judges process was stayed upon that estreat, as being imposed contrary to law. (h)

6. Before justices of *oyer* and *terminer* and gaol-delivery, if the jury acquitted a felon contrary to their evidence, the use was to bind them over to appear in the king's bench to answer an information, but I never knew any preferd, and indeed it were impossible almost for any judge or jury to convict a [312] jury upon such an account, because impossible, that all the circumstances of the case, that might move the jury to acquit a prisoner, could be brought in evidence; this therefore seems to me to be but *in terrorem*.

7. But then it was endeavoured to bring the practice of the king's bench into use before justices of gaol-delivery and *oyer* and *terminer* to fine jurors in criminal causes for not observing the judges directions, and acquitting felons against their evidence, and accordingly a jury in *Gloucestershire* was fined 5*l.* a man for acquitting a person indicted of burglary, the form of the fine was much the same as is hereafter mentiond, this fine

(h) *Vide antea* *cop.* 22. p. 160. *Vaugh.* 145.

evidence and the opinion of the judge. Upon motion for a new trial, it was agreed that the verdict must be set aside. *Hale v. Cove*, *Str.* 642. But it was determined that the affidavit of none of the jurymen themselves could be admitted in evidence, in all of whom such conduct is a very high misdemeanor; but in every such case the court must derive their knowledge from some other source, such as from some person having seen the transaction through a window, or by some other means. *Vasey v. Delaval*, 1 *T. R.* 11; *Owen v. Warburton*, 1 *N. R.* 326; *Parr v. Seames*, *Barnes*, 438; see *Roberts v. Failes*, 1 *Cow.* 238; *Harvey v. Rickett*, 15 *Johns.* 87; *Warner v. Robinson*, 1 *Root*, 194.

was also estreated into the *Exchequer*, but all the court after great advice with the judges of the common pleas ordered a stay of process thereupon, as being neither warrantable by law nor antient precedents in any court less than *Eyre*.

At the gaol-delivery at *Newgate* 10 *Maii* 17 *Car. 2. Wagstaff*(i) and eleven other jurytmen were fined five marks apiece for acquitting *Richard Tomson* and others indicted for conventicles, *Eo quod ipsi juratores adtunc & ibidem eosdem Ricardum Tomson &c.*, de prædictâ transgressionem & contemptu contra regem hujus regni *Angliæ*, & contra plenam evidentiam, & contra directionem curiæ in materiâ legis ibidem de & super præmissis eisdem juratoribus versûs præfatos *Ricardum Tomson &c.* in dictâ curiâ ibidem apertè dat' & declarat' de præmissis eis impositis in indictamento prædicto acquietaverunt in contemptum dicti domini regis nunc legûmque suarum, & ad magnam obstructionem & impedimentum justiciæ, necnon in malum exemplum omnium aliorum juratorum in consimili casu delinquentiûm.

They were thereupon committed, and brought their *habeas corpus* in the court of common-bench, and all the judges of *England* were assembled to consider of the legality of this fine, and the imprisonment thereupon, wherein there was some little diversity of opinion, whether without a cause of suit returned also, the common pleas could give judgment touching this fine, and if there were cause, deliver the party, or whether he must go into the king's bench by *habeas corpus* and *certiorari*.

But it was agreed by all the judges of *England*, (one only dissenting,) that this fine was not legally set [313] upon the jury, for they are the judges of matters of fact, and altho it was inserted in the fine, that it was *contra directionem curiæ in materiâ legis*, this mended not the matter, for it was impossible any matter of law could come in question, till the matter of fact were settled and stated and agreed by the jury, and of such matter of fact they were the only competent judges.

And altho the witnesses might perchance swear the fact to the satisfaction of the court, yet the jury are judges as well of the credibility of the witnesses, as of the truth of the fact, for possibly they might know somewhat of their own knowledge, that what was sworn was untrue, and possibly they might know the witnesses to be such as they could not believe, and it is the conscience of the jury, that must pronounce the prisoner *guilty* or *not guilty*.

And to say the truth, it were the most unhappy case that

(i) In *Bushell's case*, *Vaugh.* 153.

could be to the judge, if he at his peril must take upon him the guilt or innocence of the prisoner, and if the judge's opinion must rule the matter of fact, the trial by jury would be useless.

Whereupon, and upon view of the precedents in the court of common bench, where prisoners not legally committed or fined had been discharged, tho no cause of privilege were returned, the jurors were discharged of their imprisonment.

And therefore, altho the long use of fining jurors in the king's bench in criminal causes may give possibly a jurisdiction to fine in these cases, yet it can by no means be extended to other courts of sessions of gaol-delivery, *oyer* and *terminer*, or of the peace, or other inferior jurisdictions.[6]

3 Wilson, 172, 177.

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CHAPTER XLIII.

CONCERNING STANDING MUTE, AND THE PUNISHMENT OF PENANCE, OR PEINE FORTE & DURE.[1]

I HAVE hitherto considered the pleas of the prisoner in capital causes, namely, 1. Confession. 2. Pleas in bar, and 3. Pleas to the felony, or *not guilty*.

And I have considered the proceedings in order to bring the party to his trial, and the trial thereupon by the jury.

It remains, that I should now come to consider what is to be done in case the prisoner will not answer, but stand mute and make no defense.

[6] No one is liable to a prosecution in respect of any verdict given by him in a criminal matter, either upon a grand or petit jury; for, since the safety of the innocent and punishment of the guilty do so much depend upon the fair and upright proceedings of juries, it is of the utmost consequence that they should be as little as possible under the influence of any passion whatsoever; and therefore, lest they should be biassed by the fear of being harassed by a vexatious suit, for acting according to their consciences, the law will not leave any possibility for a prosecution of this kind. 1 *Hawk. c. 72, s. 5*; *Groenvelt v. Burwell, Ld. Raym.* 469. The fining and imprisoning of jurors for giving their verdict hath several times been declared in parliament an illegal and arbitrary innovation, and of dangerous consequence to the government, and the lives and liberties of the subject. 2 *Keb.* 180. See *Bushell's case, Vaugh.* 135; 6 *How. St. Tr.* 989; *Ld. Erskine's Speech* on the Trial of the Dean of St. Asaph, 21 *id.* 925. By the 6 *Geo. IV. c. 50, s. 60*, writs of attain against jurors, are abolished. By *ss. 51, 53, & 54*, jurors are fineable for default of attendance. See *Ex parte Sir Thomas Clarges, 1 Younge & J.* 399.

[1] See *Notes to Vol. I. pp. 35, 224.*

In this matter these things are considerable.

1. What shall be said in law a *standing mute*, and what not.
2. What the consequence or penalty is of a standing mute in capital causes, and therein of *peine fort* and *dure*.
3. What cautions are to be used before the inflicting of it.
4. By what law it is introduced.

I. As to the first of these.

If the prisoner hath received his judgement already, or be convicted and brought to the bar, and demanded what he can say, why judgment should not be given against him, if convicted, or why execution should not be awarded, and he saith nothing, yet this is not such a standing mute as is in hand, for he is already convict or attain: And therefore in such case, if the party so called hath always remained in custody from the time of his plea of *not guilty*, if he be called to shew what he can say, why he should not have judgment upon his conviction or execution upon his former judgment, and he say [315] nothing, it shall not be inquired, whether he can speak or not, but he shall not have present judgment or execution, as the case requires. 10 E. 4. 19. b. But if long time hath passed between his conviction or judgment and this second calling to the bar, it is prudent to make the inquiry, at least by witnesses, whether he can speak, for possibly he may have a pardon to plead.

But if a man abjure or be outlawd of felony, and after return again, and be taken and brought to the bar to shew cause why execution should not be done, if he stand mute, an inquest of office is to be taken by the court to inquire, whether he can speak or not, and if it be found, that by the visitation of God, since his abjuration, &c. he hath lost his speech, it shall be also inquired, whether it be the same person contained in the record of outlawry or abjuration, before judgment or execution (as the case requires,) shall be awarded against him, for he may plead in bar of execution in such case, that he is not the same person. 10 E. 4. 19. b. 8 H. 4. 1. b. And so it seems to be, if he were brought in upon a *capias utlegat'* or *habeas corpus* by the sheriff; *de quo infra*.

And therefore the book of 26 Assiz. 19. that saith a party abjured standing mute shall have *peine fort & dure* is mistaken, for he shall be hanged, if he stand mute of malice. *Stamf. P. C. Lib. II. cap. 60. fol. 150. b.*

If a man indicted of felony demur to the indictment, and will not otherwise answer, this is no standing mute, but if the demurrer be ruled against him, he shall have judgment of death. 14 E. 4. 7. a. *per cur.*

If a man indicted or appeal'd of felony pleads *not guilty*,

and puts himself upon the country, and the jury remains upon challenges till another day and then appears, and the prisoner at the bar will say nothing but stand mute, yet this is not a standing mute, for the inquest shall be taken upon the issue already joined; and so in an appeal. 15 E. 4. 39. b.

And yet even in that case it is possible the prisoner may be taken dumb between his plea and his trial, and so [316] lose some advantages, that the law gives him for his defense, as challenges, examination of witnesses and many matters for his defense; [therefore] the court hath used sometimes by inquest, sometimes by inquiry *ex officio* by the inquest impannelled to try his issue to inquire, whether he stand mute of malice, and then to try him, or if it be *ex visitatione Dei*, then to respite his trial, but if he spoke the same day in the hearing of the court, then such inquest of office is not taken, for the court is of their own knowledge ascertained of his ability to speak. 43 Assiz. 30. 8 H. 4. 1 & 2.

The standing mute of a prisoner is not, where he hath pleaded *not guilty* and put himself upon the country, tho afterwards he would retract it.

If a prisoner for felony plead *not guilty* and put himself upon the country, and when the jury appears he challengeth peremptorily above thirty-five, in such case the jury was not to be taken, but judgment of penance was antiently given against him, and so it was no attainder in case of felony. 17 Assiz. 6. 17 E. 3. 23. a. 14 E. 4. 7. a. 3 H. 7. 12. a. 2. a.

But the law herein was after declared otherwise, and by the advice of all the judges judgment of death shall be given, and so it was an attainder. 3 H. 7. 12. a. where it was settled for a rule in all circuits, and so it continued until 22 H. 8. cap. 14. when by act of parliament the challenge was reduced to twenty, and so the judgment of death upon peremptory challenge ceased, unless in high treason or petit treason, where it stands on foot as before, *vide Co. P. C. cap. 102. p. 227, 228.* who seems to hold, that for challenging above thirty-five judgment of *peine fort & dure* shall be given according to 14 E. 4. 7. a. & 3 H. 7. 2. a. *per omnes justiciarios contra Keble.*

Regularly therefore a man is said to stand mute, when being arraigned for felony or treason, either 1. He answers not at all, or 2. If he answers with such matter, as is not allowable for answer, and will not answer otherwise, or 3. Where he pleads *not guilty*, but when demanded how he will be tried, either will say nothing, or not put himself upon the country.

If he stand mute and say nothing at all, in case of felony the court ought *ex officio* to impanel a jury and swear it as an inquest of office to inquire, whether he stand mute of malice, and if found so, he shall have the judgment of *peine fort & dure*, or whether it be *ex visitatione Dei*, and if found so, they are to inquire touching all those points, which he might possibly plead for himself, as whether a felony were done, whether he be the same person, that is indicted for it, whether he did it, and whether he hath any matter to alledge for his discharge.

But what if all this be found against the prisoner, what shall be done? whether judgment of death shall be given against him, tho he never pleaded, seems yet undetermined. (u)

If a man plead *not guilty*, and being demanded how he will be tried answers by God and holy church 4 *E.* 4. 11. *a.* or delivers in a protection 7 *E.* 4. 29. *a.* *Coron.* 30. or will not put himself upon trial of his country, this is a standing mute, as much as if he had not at all pleaded.

II. As to the consequences of standing mute.

In case of an indictment of high treason, the party standing mute, judgment of high treason shall be given against him as upon a *nihil dicit*, *M.* 3 & 4 *Eliz. Dy.* 305. *a.* *rule accordant.* *Stamf. P. C. Lib. II. cap. 60. fol. 150. a.* 2 *Co. Inst. super stat' Westm'* 1 *cap. 12. vide infra, cap. 44.*

In an appeal antiently it had been held, that if the prisoner stands mute, judgment should be given for the appellant. 21 *E.* 3. 18. *a.* (*)

But afterwards the law was held all one in case of an appeal and of an indictment, namely the defendant standing mute judgment of *peine fort & dure* was given against him, and the statute of *Westm'* 1. *cap. 12* speaks only of the king's suit, (†) *vide* 43 *Assiz.* 30. 3 *H.* 7. 2. *a.* 14 *E.* 4. 7. *a.*

If a man be indicted of felony and stands mute, he shall be put to penance, *T.* 18 *E.* 2. *B. R. Rot.* 20. *in dorso*, *Berks. rex.* (b) And yet *vide* *H.* 18. *E.* 3. *B. R. Rot.* [318] 16. *Ebor. rex.*, *Petrus Geilherd* arraigned (c) *pro de-*

(a) *Vide B. Corone* 217, where a person, who could neither speak nor hear, was arraigned for felony; *vide Part I. p. 34. in notis.*

(*) See *State Tr. Vol I. p. 367.* lord *Audley's case.*

(†) 2 *Co. Inst.* 178.

(b) This was the case of *Stephen le Ferroure*, who was indicted before justices of oyer and terminer *pro receptamento felonum*, and upon being arraigned *mutum se tenuit*, a jury was impanelled *ex officio*, who found *quod mutum se tenet de merâ & spontaneâ voluntate suâ, & quod loqui potest si velit*, and he was thereupon put to penance, *ad panam*; the record was removed by writ of error *coram rege*, where he pleaded *not guilty*, and was committed to the marshall and afterwards produced the king's pardon, *Ideo inde quietus.*

(c) It appears by the record, that it was not upon arraignment that he stood

predatione in regid vid stood mute, and an inquest of office being charged to inquire, if it were wilful, and found so, he had judgment to be hanged.

On the other side *T. 30 E. 3 Rot. 11. in dorso Hunt. rex*, The bishop of *Ely*, arraigned for felony *dicit, quodd ipse est membrum sanctæ ecclesiæ, & episcopus unctus, & frater domini papæ*, and that he could not answer without the archbishop of *Canterbury* [his ordinary] *coram laico iudice*; there went out thereupon a writ to the sheriff of *Hunt.* to return twenty-four to inquire of the whole fact, and by the inquest he was found guilty of the felony charged upon him [*de receptamento felonum*] and his goods seised, but he was demanded by the archbishop of *Cant.* and delivered to him as a member of holy church, so that there the fact was inquired of, tho the bishop refused to answer, which was a kind of standing mute.(d)

By the statute of 33 *H. 8. cap. 12.* any person arraigned before the lord steward for treason, murder, manslaughter, or blood-shed in the king's palace, and standing mute shall have judgment, as if convicted so there is no penance in that case.

But upon the statute of 28 *H. 8. cap. 15.* for commissioners of the admiralty proceeding in maritime felonies, &c: [319] there is no such exclusive provision, and therefore they follow herein the course of the common law, so that any person indicted for piracy before these commissioners standing mute shall have judgment of *peine fort & dure T. 7. Eliz. Dy. 241. b. Brooke's case.*

The judgment of *peine fort & dure* is, as it is recited by *Stamf. P. C. Lib. II. cap. 60. fol. 150. b. & 4 E. 4. 11 b. viz.* "That he be sent to the prison from whence he came, and put into a dark, lower room, and there to be laid naked upon the bare ground upon his back without any clothes or rushes under him or to cover him except his privy members, his legs and arms drawn and extended with cords to the four corners of the room, and upon his body laid as great a weight of iron, as he can bear, and more. And the first day he shall have three

mute, for he had fled from justice and was outlawed, but being afterwards taken he was brought into court, and demanded why execution should not be done upon him in pursuance of the outlawry, to this he made no answer; but this is not a standing mute to the purpose in hand, as our author himself hath shewn at the beginning of this chapter.

(d) This was not properly a standing mute, but a claiming the benefit of clergy, (which in antient times was usually done before pleading,) and was of the like nature with the case of *Alan de Beckingham Mich. 20 & 21 Edw. 1 Rot. 4. in dorso coram rege, Nottingham, see Part I. p. 343. in notis*, and the case of *John de Bosco, P. 6 E. 2. B. R. Rot. 2. Essex, see Part I. p. 180 in notis*, the reason therefore, why the fact was inquired of, was the same in this case, as in those, viz. that it might be known *pro quali ordinario liberari debeat*, whether as a clerk convict or acquit. *Vide 2 Co. Inst. p. 633.*

morsels of barley bread without drink, the second day he shall have three draughts of water, of standing water next the door of the prison, without bread, and this to be his diet till he die." (e) *Vide* the entry thereof *Rast. Entries*, 385. a.

This judgment is given for his contempt in refusing his legal trial, and therefore he thereby forfeits his goods, but it is no attainder, nor gives any escheat or corruption of blood: *vide* 34 E. 3. *Escheat* 10. *Dy.* 308. a. 14 E. 4. 7. a.

The severity of the judgment is to bring men to put themselves upon their legal trial, and tho sometimes it hath been given and executed, yet for the most part men bethink themselves and plead.

If a peer of the realm arraigned upon an indictment of felony before his peers refuses to plead, [he shall have] this judgment of *peine fort & dure*. *P.* 17 *Car.* 1. *casus domini Castlehaven.* (f)

And a woman shall have the same judgment if she stands mute. 2 *Co. Inst.* 177. *super stat. Westm.* 1. cap. 12, *Wiseman's* case there cited. If a man be indicted of petit larceny and refuses to plead, it seems judgment of *peine* [320] *fort & dure* shall not be given, but the party convict, for he is not to have judgment of death.

But if a woman be indicted for simple larceny of goods under 10s. tho she shall not die for it, but only be burnt in the hand by the statute of 21 *Jac.* cap. 6. yet if she refuses to plead, the judgment of *peine fort & dure* shall be given against her, because it may fall out upon the case, that she hath been burnt in the hand before, and then she is to be executed; and it is but a privilege, as clergy is, which she must put herself by her defense into a capacity of enjoying.

If a new felony be made by act of parliament, tho it makes no provision touching the penalty of standing mute, yet it is a necessary consequence thereof, tho not specially provided for, if it be not ousted by the act, that makes it felony; as clergy is an incident to every new created felony, unless specially ousted by act of parliament, (*) for they are incidents: *vide Dy.* 241. b.

And therefore in rape, tho made felony by *Westm'* 2. cap. 34. if the party indicted stand mute, he shall have judgment of penance. *P.* 7 *Car.* 1. lord *Castlehaven's* case.

The judgment be given of *peine fort & dure*, yet if the offense laid in the indictment be within clergy, his clergy shall

(e) But before they proceed to this extremity, it has been the practice to endeavour to make the prisoner plead by tying his thumbs together with whip cord. *Thorley's* case *Kel.* 27.

(f) *State Tr.* Vol. I. p. 367.

(*) *Vide Part I.* p. 704.

be allowed him, which appears by the statutes of 23 H. 8. *cap.* 1. 25 H. 8. *cap.* 3. and other statutes that oust clergy, where the party stands mute, in some particular cases, and by the books.

III. As for the third general, the necessary cautions to be used in inflicting this severe punishment are these.

1. Let not the judgment be too hastily given, let the prisoner have not only *trina admonitio*, but also some convenient respite, possibly till the afternoon, to bethink himself, if the arraignment be in the morning; or till the next morning, if the arraignment be in the afternoon: and let the judgment [321] itself be distinctly read to him, that he may know his danger before his final refusal with due admonition not to destroy himself. 4 E. 4. 11. b.

2. Before any judgment final be given, if the prisoner stands wholly mute and says nothing at all, let an inquest of office be taken to inquire, whether it be *ex malitia*, or *ex visitatione Dei*, unless he hath spoken in court the same day, *vide Rast. Entries title gaol-delivery*.

3. And likewise let the judge hear the witnesses upon oath to give a probable testimony of his guilt, for tho his malicious silence carries with it a presumption of guilt, yet it is good to have some concurrent testimony. 1. In respect of the severity of the judgment. 2. Because the statute of *Westm*' 1. *cap.* 12. *de quo infra*, seems to require it.

4. If the offense laid in the indictment be within clergy, tho in strictness of law the prisoner ought to pray it, yet it is the duty of the judge to allow it, tho not prayed, and that as well after judgment pronounced as before.

IV. Concerning the fourth particular, by what law this judgment of *peine fort & dure* is introduced.

By the statute of *Westm*' 1. *cap.* 12. *Purvieu est ensement que les felons eseries, & queux sont apertement de male fame, & ne soy voilent mitter en enquest de felonies, que homes met sur eux devant justices a la suit le roy soient mises en la prison fort & dure, come ceux queux refusent estre al common ley de la terre, mes ceo nest my a entendre pur prisoners, que sont prises per legier suspicion.*

Some(h) have antiently thought, that this act of parliament introduced the penance, and therefore they did antiently think it did not extend to an appeal, because that is the suit of the party and not the suit of the king, *de quo antea p.* 317.

But it seems, that altho this statute is in some points directive, namely, that it should be applied to those, that are of ill

fame, and not those, who are taken upon a light suspicion, and therefore the court before they give this judgment ought either by inquest of office, or at least by examination of witnesses to inquire concerning the probabilities of the [322] guilt: *vide Stamf. P. C. Lib. II. cap. 60. fol. 150. a.* yet this statute doth not originally introduce the penance, but it was to be done by the common law, and accordingly it is agreed by my lord *Coke* in his comment upon this statute 2 *Inst. p. 179.*

And this appears 1. Because this statute only speaks of imprisonment *fort & dure*, but enacts not the punishment itself by this lingering painful death, therefore the punishment, as it is thus inflicted, was at common law, and is by force of the common law. 2. Because tho some antient opinions were, that it extended not to the case of an appeal of felony, yet the law hath constantly for many ages extended it to an appeal,⁽ⁱ⁾ which cannot be by force of this statute, but by the common law.

3. The antients, as *Fleta*,^(k) *Britton*^(l) and *Horn*,^(m) tho they wrote since the making of this statute, mention the penance without referring of it to this act of *Westm' 1.*(n)

(i) *Kel. 37.*

(l) *Cap. 4. § 23. & cap. 22. § 73.*

(k) *Lib. I. cap. 34. § 83.*

(m) *Mirror, cap. 1. § 9.*

(n) This statute was made 3 *E. 1.* and tho by the manner of the expression it does not seem to have introduced this penance, but rather speaks of it as a thing already known, yet I cannot find, that it is ever taken notice of in any antient author, book, case, or record before the reign of *E. 1.* on the contrary I find some instances in the preceding reign of persons arraigned for felony standing mute, who yet were not put to their penance, but had judgment to be hanged: at which time it seems to have been the usual practice, that if the prisoner stood wilfully mute, a jury of twelve were impannelled *ex officio*, and if they found him guilty, another jury of twenty-four were chosen to examine the verdict of the former; and if they were of the same opinion, the prisoner was sentenced to be hanged. *Placita coronas coram justic' itinerant' in comitatū Warwicensi anno 5 H. 3 Rot. 1.*

"*Agnes, quæ fuit uxor Roberti de Bosco, appellat Thomam filium Huberti de morte Roberti viri sui, & Thomas venit, & quia ipsa habet virum Robertum de Verdus nomine, qui nullum facit appellum, ipsa non habet vocem appellandi, & ideo inquiratur veritas per patriam, & Thomas defendit mortem, sed non vult ponere se super patriam, & xii juratores dicunt, quod culpabilis est de morte illa, & xxiv milites, alii a prædictis xii, ad hoc electi idem dicunt, & ideo suspendatur.*"

Catalia Thomæ xxiv. solidos & vi denarios, unde vicecomes respondebit.

Ibidem in dorso. "*Thomas de la Hethe captus per indictamentum pro furtis & aliis nequitiiis & pre receptamento venit, & non vult ponere se super patriam; & juratores dicunt super sacramentum suum, quod malè credunt eum de receptamento Holbæ Golightly, qui fuit latro cognitus, & postea suspensus apud Cawnpes'em, & de hoc & de aliis furtis eum malè credunt, & xxiv milites ad hoc electi dicunt idem, quod prædicti xii juratores, & quod latro est de ovibus & de averiis & aliis rebus, & ideo suspendatur.*"

CHAPTER XLIV.

CONCERNING CLERGY HOW IT STOOD AT COMMON LAW, AND
HOW GENERALLY AT THIS DAY.[1]

HAVING in the former chapter gone through the pleas and trials of the prisoners, and the proceeding upon standing mute, I come to consider the *privilegium clericale*, and I the rather refer it to be examined in this place, because tho antiently clergy was prayed and allowed upon the arraignment of the prisoner, yet at this day it is rarely done but upon his conviction or standing mute, and this is, 1. For the convenience of the court to be ascertained first of the nature of the crime by the confession or trial of the prisoner. 2. For the advantage of the prisoner, who possibly may be acquitted, and so need not the benefit of clergy: *vide Hob. Rep.* 288. *Searle & Williams.*

And for the full discussion of this matter, (which I must needs say is one of the most involved and troublesome titles in the law,) I shall, as near as I can, hold this method. 1. To consider somewhat in general touching the original and alteration of the privilege of clergy. 2. In what cases it is to be allowed, and in what not.(a) 3. What persons are capable of this privilege, and what not.(b) 4. At what time it is to be allowed, and when not.(c) 5. The manner how it is to be allowed, and who the judge of it.(d) 6. The consequence of the praying or allowing of it.(e)

For the first of these, namely the original and progress of this *privilegium clericale*.

Antiently princes and states converted to christianity in favour of the clergy, and for their encouragement in their offices and employments, and that they might not be so much intangled in suits, did grant to the clergy very bountiful privileges and exemptions, principally of two kinds. 1. Exemption of [324] places consecrated to religious duties from arrests of crimes, which was the original of sanctuaries. 2. Ex-

(a) *Cap.* 45, 46, 47, 48, 49, 50.

(c) *Cap.* 52.

(d) *Cap.* 53.

(b) *Cap.* 51.

(e) *Cap.* 54.

[1] The benefit of clergy is now abolished in England by the 7 & 8 Geo. IV. c. 28. s. 6; and by the 4 & 5 Vict. c. 22, as to peers.

By the act of Congress of 30th April, 1790, s. 31, the benefit of clergy shall not be used or allowed, upon conviction of any crime, for which, by any statute of the United States, the punishment is or shall be declared to be death.

emption of their persons from criminal proceedings in some cases capital before secular judges, which was the true original of the *privilegium clericale*.

The clergy increasing in wealth, power, honour, number and interest, afterwards set up for themselves, and that, which they obtained by the favour of princes and states at first, they now began to claim as their right, and a right of the highest nature, namely *jure divino*; and by their canons and constitutions endeavoured, and (where they met with tame and easy princes and states,) obtained vast extensions of these exemptions.

1. In the person concerned, namely to all that had any kind of subordinate ministration relative to the church. 2. In the causes, exempting as far as they could all causes of clergymen, as well civil as criminal, from the jurisdiction of the secular power, and wholly subordinating them immediately and only to the ecclesiastical jurisdiction, which they supposed to be lodged first in the pope by divine right and investiture from *Christ*, and from the pope shed abroad into all subordinate and ecclesiastical jurisdictions, whether ordinary or delegate.

And by this means they endeavoured and in some kingdoms and for some ages obtained, that there was a double supreme power, or two kingdoms in every kingdom, the one a *regnum ecclesiasticum*, absolute and independant upon any but the pope over ecclesiastical men and causes, exempt and separate from the secular magistrate; the other a *regnum seculare* of the king or civil magistrate, which yet was not so absolute, but that it had subordination and subjection to this *regnum ecclesiasticum*; so it was *regnum sub graviore regno*.

He that lists to see the whole scheme of their claim, let him read *Suarez* his large discourse of the *monumenta ecclesiastica* in his *opuscula*.

But altho the usurpations of the pope were very great and obtained much in this kingdom, until the extermination of his pretended supremacy by king *H. 8.* yet this claim of the exemption of the clergy totally from secular juris- [325] diction grew so burdensome and intolerable, that it was from time to time qualified and abridged by the civil power, sometimes by acts of parliament taking it away in some cases, sometimes by the interpretation and construction of the judges, and sometimes by the contrary usage of the kingdom; for ecclesiastical canons never bound in *England* farther than they were received; and so had not their authority from their own strength and obligation, but from the usages and customs of the kingdom that admitted them, and only so far forth as they were so admitted. And therefore,

I. As to the exemption of the clergy from civil suits between
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party and party only, if upon the *distringas* he was returned *clericus & beneficiatus non habens laicum feodum*, process issued to the bishop to bring him in, and in case of a statute merchant they were by special acts exempted from arrests by *capias*. But yet they were not exempt from the jurisdiction of civil courts in civil causes, yet antiently they attempted this also in the king's courts but with ill success, and so they never attempted it after, that I remember.

M. 7 & 8 E. 1. B. R. Rot. 13. Cant. William Joye plaintiff [brought an action] against *Guy Mortimer rector of Kingston* for beating him and cutting off his upper lip with a knife, the defendant pleaded *quod ipse est clericus, & non debet hic respondere*, and that was all the answer he would give, *Et quia querela ista non tangit vitam & membrum, sed est de quâdam transgressionem personali, nec ipse vult in curia domini regis respondere ad querelam istam*, judgment was given for the plaintiff to recover 100*l.* damages taxed by the court, and [the defendant was] committed to gaol, and afterwards paid twenty marks to the king for a fine.(o)

II. If they were indicted in cases criminal but not capital, nor wherein they were to lose life or limb, there *privi-*
[326] *legium clericale* was not allowd them, and therefore not in indictments of trespass, petty larciny, or killing *se defendendo*. *Stamf. P. C. fol. 124. a.*

III. If they were not indicted of high treason, clergy was not allowable, and therefore *Hill. 2 H. 4. Rot. 4. B. R. rex*, where the bishop of *Carlisle* was indicted of high treason, and insisted upon his *privilegium clericale, quia episcopus unctus*, yet this claim was disallowd and he put upon his trial, and convicted.(p)

(o) The record of that case was thus, *Willielmus Joye de Kyngeston queritur de Guydone de mortuo mari, rectore ecclesie de Kyngeston & Thomâ le Clerc de Hereington de hoc, quod Thomas simul cum aliis ex præcepto prædicti Guydonis ipsum Willielmum insultaverunt, verberaverunt, & male tractaverunt, ita quod de vitâ ipsius desperabatur; & dictus Guydo manû suâ propriâ, & knypulo suo habium ipsius Willielmi superius abecidit, unde dicit quod deterioratus est & dampnum habet ad valentiam centum librarum; & inde producit sectam. Et prædicti Guydo & Thomas veniunt & dicunt, quod clerici sunt, & non debent hic respondere, & sepius quesiti si velint respondere, semper dicunt quod clerici sunt, & sine ordinariis suis nolunt respondere. Et quia querela ista non tangit vitam & membrum, sed est de quâdam transgressionem personali, nec ipsi volunt in curia domini regis respondere ad querelam illam, consideratum est, quod prædicti Guydo & Thomas de prædictâ transgressionem convincantur, & satisfiant prædicto Willielmo Joye de dampnis, scilicet quilibet eorum de centum libris, & domino regi de misericordiâ, & committantur gaolæ pro transgressionem &c.*

(p) The treason given in the record is in these words, "Quicumque ligens domini regis, cujuscumque status, seu conditionis, spiritualis, vel temporalis fuerit, in terrâ *Angliæ* pro altâ proditiõne & crimine læsæ majestatis indictatus est, & coram rege, vel iusticiariis suis inde arrenatus tenetur, & debet per legem *Angliæ* inde respondere.

Yet in antient times a difference was made between treasons, that were imme-

Yet *Hill. 17 E. 2. Rot. 87. in dorso, Heref. coram rege*, the bishop of *Hereford* indicted of high treason for levying war against the king alleged, that he was *episcopus Heref. ad voluntatem Dei & summi pontificis*, and could not answer *absque offensâ divinâ & sanctæ ecclesiæ*. Thereupon the plea was adjourned into parliament, where the bishop answered as before, and the archbishop of *Canterbury* claimed him and had him; thereupon it was ordered, that day should be given in the king's bench to the bishop, and the archbishop was to have him there at the day, and in the mean time a writ issued to the sheriff of *Heref.* to return twenty-four to inquire, as if he had pleaded, [*quodd venire faciat tot & tales, &c. ad inquirendum prout moris est, &c. proquali, &c.*] returnable at the same day; the bishop appeared accordingly in the custody of the archbishop, and the jury found him guilty, *Ideo con-* [327] *siderat' est, quodd prædictus episcopus, tanquam convictus &c. remaneat penes prædictum archiepiscopum ut prius, &c.* and all his goods and chattels, lands and tenements were seised into the king's hands by writ directed to the sheriff: Upon which it is observable, 1. That a kind of allowance is made of clergy in high treason. 2. That notwithstanding his claim of clergy, yet a writ issued to summon a jury, who inquired whether guilty or not. 3. That upon this plea and this inquisition, tho he had his clergy, it was *ut clericus convictus*.

Nota in the parliament of the 1 *E. 3.* this judgment was reversed for this cause, that the justices took the inquisition, *licet idem episcopus in aliquam inquisitionem se non posuisset*. *Claus. 1 E. 3. Part I. M. 13.* so that the judgment was given upon the inquisition, and not upon *nihil dicit* for standing mute, and therefore erroneous.(g)

diately against the king's person, and other treasons; *vide Part I. p. 185, 186, 222. in notis*; and the case of the bishop of *Hereford* here mentiond.

(g) The error of this judgment consisted not merely in its being given upon an inquisition "in quam episcopus se non posuisset," but because it was given upon an inquest, "in quam episcopus se non posuisset," after he had been allowed his clergy and deliverd to his ordinary. For the *Placita Coronæ* of those times shew, that it was the constant practice of inquests *ex officio* to pass upon clerks pleading their *privilegium clericale*, where clergy was allowable the method whereof was thus. The clerk upon his arraignment pleaded his *privilegium clericale*; then came the ordinary and demanded him; then a jury *ex officio* was summoned to inquire into the truth of the charge; or as it is express in this record, "ad inquirendum, prout moris est, pro quali, &c. (i. e. pro quali eidem ordinario liberari debeat,)" and according to such inquest, the clerk was deliverd to the ordinary as acquit, or convict. Thus are the entries upon the rolls, "*A. B. indictatus de felonâ, eo quod, &c. & ductus coram rege, & allocutus qualiter se velit de felonâ predictâ acquietare, dicit quodd clericus est, & sine ordinario suo non debet hie respondere. Et super hoc venit C. D. &c. Et petit ipsum tanquam clericum sibi liberari; sed ut sciatur pro quali eidem ordinario liberari debeat, inquiratur*

But afterwards *T. 21 E. 3. Rot. 23. Hertford, rex, John Gerberge*, was indicted for a constructive treason namely, acroaching royal power, *de quo vide supra, Part I. cap. 11. p. 80. 138.* and thereupon claimed the privilege of clergy, *Et quia privilegium clericale in hujusmodi casu seditionis secundum legem & consuetudinem regni hactenus obtentas & usitatas non est allocandum &c. quæsitum est ab eo sapius qualiter se velit acquietare*, he still replied, that he was a clerk, [328] *asserens se nolle aliam responsionem exhibere*; and thereupon he is committed to the marshal *ad pœnitentiam suam secundum legem & consuetudinem regni subitutum, &c.*

Nota clergy denied in such a treason, yet penance awarded, tho the charge was treason.

Yet at common law before the statute of *25 R. 3. cap. 4. pro clero*, it seems that clergy was allowable to him that was indicted for counterfeiting coin, or for counterfeiting money. *B. Clergy 1.* But that is altered by the statute of *25 E. 3. pro clero.*

IV. If clerks were indicted with these clauses *insidiatores viarum & depopulatores agrorum*, clergy was denied them, and therefore the act of *4 H. 4. cap. 2.* was made to put these clauses out of indictments and to allow clergy, if they were in the indictment.

Again, as it was denied in respect of some offenses, so this *privilegium clericale* was by the common law abridged in respect of the person; for certainly by the canon laws Nuns had the exemption from temporal jurisdiction, but the privilege of clergy was never allowd them by our law: *vide stat' 21 Jac.(r)*

Again, tho the ordinary took himself to be the judge of the allowance of the clergy and of the purgation of the clerk, yet the king's courts took that courage to make the ordinary but a minister, and themselves judges of the allowance and disallowance of the clergy and purgation. *21 E. 4. 21. b. 9 E. 4. 28. a.*

And so the judges of the common law would oftentimes deliver the clerk to the ordinary, but *absque purgatione*, as where the clerk is attaint by outlawry or by judgment, or convict by his own confession, or upon an appeal. *Stamf. P. C. Lib. II. cap. 49. 3 H. 7. 12. a. 10 E. 3. Coron. 247. Hob. Rep. 288. Searle & Williams*, or if he were a notorious malefactor, *vide*

rei veritas per patriam." Then a jury *ex officio* was summoned, by which if it was found, "*Quod A. B. non est culpabilis, liberatur ordinario pro tali &c.*" But if culpabilis "*liberatur ordinario tanquam clericus convictus, salvo custodiendus, sub pœnâ quâ decet &c.*" *Vide M. 20 & 21 E. 1. Rot. 4. in dorso, B. R. Hill. 22 E. 1. Rot. 15. Ibid. Trin. 30 E. 3. Rot. 11. B. R. Rex. Trin. 31 E. 3. Rot. 15. Ibid. Rex.*

(r) *Cap. 28. §. 6 & 7.*

10 E. 3. *Corrn.* 247. or if he be convict by verdict of counterfeiting the seal or coin at common law before the statute of 25 E. 3. *Lib. Parl.* 18 E. 1. *Berton's case*,(*) or if he be committed by record to the ordinary *absque purgatione*. *Hob. ubi supra*.

And in these cases, if the ordinary admitted him to his purgation, he was fineable for it as a great misdemeanor, and the party deliverd by such purgation shall be again committed to prison, *M. 34 & 35 E. 1. Rot. 59. Kanc. B. R.* the case of *Hugh Forsham* deliverd by *William Testa*, and another commissioned from the pope;(s) and the entry in such cases is, *liberatur ordinario tanquam clericus convictus & utlegatus ad salvò custodiend' periculo, quòd incumbit &c. & inhibitum est eidem ordinario, nè ad aliquam purgationem ipsius A. B. procedat domino rege inconsulto, eò quòd prædictus A. B. pro felonis &c. utlegatus est &c.* *H. 14 E. 3. B. R. Rot. 19. Rex Suff. Lond.* The case of *John de Hemmyngeston* chaplain. But indeed, if the clerk had had his clergy and were generally deliverd to the ordinary, he might admit him to make his purgation, and upon signification thereof by the ordinary into the chancery a writ should issue to the sheriff to deliver unto the party so purged all his goods and chattels seised into the king's hands upon that occasion, *nisi fugam fecerit eà occasione. F. N. B. 66. a.* And all this is to shew, that whatsoever weight the clergymen laid upon their canons and their exemptions from the secular jurisdictions, yet their canons or constitutions, or pretensions or claims of this kind were not binding here, nor so taken farther than either by acts of parliament or the common acceptation of the kingdom they were received; and therefore these privileges received divers alterations [330] and corrections and restrictions by the temporal judges, as the occasion required.

(*) *Ryley's Plac. Parl.* p. 56.

(s) That case was thus: Whilst the temporalities of the archbishop of Canterbury were in the king's hands, two clerks convict of felony imprisond in the archbishop's prison had been admitted to purgation, and deliverd out of custody by master *Hugh Forsham*, "Per mandatum magistrorum *Willielmi Testa*, & *Geraldii*, clericorum papæ, administratorum spiritualitatis archiepiscopatus prædicti, absque mandato domini regis." *Forsham* was brought *coram rege*, and arraigned for the said offense; and the keeper of the gaol was also arraigned for bringing the said clerks "*coram præfato Hugone ad purgandum, absque præcepto domini regis*;" and were both convicted by their own confession, and committed to the marshal, "*Et postea finem fecerunt pro transgressionibus & contemptu prædictis*." Afterwards the two clerks, who had been deliverd by such purgation, were brought from the tower, where they had been imprisond by the king's writ. "*Et separatim allocuti qualiter de felonis prædictis se velint acquietare, dicunt quòd clerici sunt, & liberantur ordinario sub pœnâ, quâ decet, &c.*"

CHAPTER XLV.

IN WHAT OFFENSES CLERGY IS ALLOWABLE OR NOT.

Now touching the offenses, wherein clergy is or was allowable, and in what not.

There are these general rules, that have influence in this whole discourse.

1. That in case of high treason against the king clergy was never allowable in this kingdom.

2. That at common law in all cases of felony or petit treason clergy was allowable, excepting two.

3. That where a statute makes a new felony, clergy is incident thereunto, unless it be specially taken away by acts of parliament; but where it makes a new treason, there is no clergy.

Upon these generals much of the succeeding business of this chapter, and some that follow will be built.

I. As to the first of these I say generally in all cases of high treason clergy was never allowed.

And this proposition will be considered two ways. 1. How the common law stood before the statute of 25 E. 3. *pro clero*, and 2. How it stood after.

The statute of 25 E. 3. *for the clergy* was made in the parliament held in *Hill*. 25 E. 3. which was in the same parliament, wherein the statute of declaration of treason is made, commonly called *The statute of purveyance*.

By this statute *pro clero cap. 4.* it is enacted, "That all manner of clerks, as well secular as religious, which shall [331] be from henceforth convict before secular judges for any treasons or felonies touching other persons than the king himself or his royal majesty, shall from henceforth have and enjoy the privilege of holy church, and shall be without impeachment or delay deliverd to the ordinaries demanding them, and upon this the archbishop promiseth, that upon the punishment and safe keeping of such clerks offenders, which shall be deliverd to the ordinaries, he shall thereof make a convenient ordinance, whereby they shall be safely kept and duly punished, so that no clerk shall take courage to offend for default of correction.

At the same parliament it was declared what was treason, and among the rest counterfeiting the great or privy seal, or the king's coin is declared treason, and put in the same rank with compassing the king's death or levying of war, and it is thereby

enacted, "That no other offenses, than what are therein declared, be treason till declared by parliament."

Before this statute there were two sorts of treasons, that concerned the king, one was of a greater note, and another of a less note.

Those of the greater note were *conspiring the king's death, levying of war against the king, adhering to his enemies*, and two others, that are since abrogated by the statute of 25 E. 3. which came under the general and obscure names of *sedition*, and *accroaching of royal power*.

In any of these a party convict had not his clergy at common law, this appears by the judgment cited in the former chapter. (a) T. 21 E. 3. B. R. Rot. 23. Rex.

But there were other treasons, that concerned the king, which were of an inferior note, namely *counterfeiting the seal and counterfeiting the coin* and these, (the latter especially,) had only judgment as in case of petit treason, namely to be drawn and hanged.

And it seems before the statute of 25 E. 3. *de prodicionibus* clergy was allowd in both cases, as appears by the old book of E. 3. B. R. title *Clergy, placito ultimo*, and the judgment in parliament of 18 E. 1. in *Berton's case*, who [332] being convict for counterfeiting the king's seal, had his clergy, but *tradatur ordinario sine purgatione*. (b)

But now as to the statute of 25 E. 3. *pro clero*, and the statute of 25 E. 3. at the same parliament *de prodicionibus* laying them both together in all cases of treason touching the king himself or his royal majesty clergy is wholly taken away, and in all other cases of treason or felony clergy is allowd; and consequently in murder, robbery, petit treason clergy is settled by this act of parliament.

But whatsoever is declared treason against the king by the statute of 25 E. 3. *de prodicionibus*, as well counterfeiting the seal or the money of the kingdom, as any other treason therein declared, is wholly exempted from clergy. 19 H. 6. 47. b. *Stamf. P. C. Lib. II. cap. 42. fol. 124. a. M. 31 E. 3. coram rege Rot. 18. Rex, in dorso, Bucks, casus abbatis de Mus-senden* (c) *pro reseccatione & falsificatione legalis monetæ*, 24 H. 8. *Spelman's Rep. accordant adjudge. 2 Co. Instit. 635, 636. super Artic' cleri.*

So that at this day in all cases of high treason, whether those declared by the statute of 25 E. 3. *de prodicionibus*, or any other treasons newly enacted since, the privilege of clergy is

(a) p. 327. *Gerberge's case*.

(b) *Vide supra* p. 328. See also Part I. p. 185, 185. in notis, & p. 223. in notis.

(c) Part I. p. 216.

wholly taken away; and, (which is the second proposition above mentiond.)

II. In all felonies, that were at common law before the statute of 25 E. 3. *pro clero*, and in all cases of petit treason by that statute the privilege of clergy is restored and settled.

And therefore in all such felonies or petit treasons, which were such at the time of the statute of 25 E. 3. *cap. 4. pro clero* clergy is allowable, unless in such cases where it is taken away by subsequent acts of parliament, and so far forth only as the same is so taken away.

But in what cases subsequent acts of parliament have taken away clergy, where at the time of the statute of 25 E. 3. it was allowable, shall be the business of the next chapter.

But yet there seem to be two felonies, where clergy [333] was not allowable notwithstanding this act, namely certain acts, that by interpretation of law were hostile acts, which was the reason, that I long since heard Mr. *Ney* then the king's attorney give for it in the king's bench about 7 Car. 1. *viz.* 1. *Insidiato viarum & depopulatio agrorum.* 2. Wilful burning of houses.

1. Concerning the former of these it appears, that *insidiatores viarum* and *depopulatores agrorum* were ousted of their clergy notwithstanding the statute of 25 E. 3. *cap. 4. pro clero.*

Rot. Parl. 4 H. 4 n. 30. there was a complaint in parliament by the archbishop of *Canterbury* and clergy, whereupon it was enacted, that *that* general clause should be left out in indictments and words of the same effect inserted, and that notwithstanding the indictment carried the same effect, yet benefit of clergy should not be denied, as appears at large by the statute of 4 H. 4. *cap. 2.*

2. As touching wilful burning of houses I have heard, as before, that clergy was not allowable by the common law, but of this more fully in the next chapter.

Now touching *sacrilege* tho some later statutes were made to oust clergy in that crime, yet it seems at common law or at least after the statute of 25 E. 3. *cap. 4. pro clero* it was allowable, as appears 26 *Assiz.* 27. where it is agreed by the justices, that a person indicted of robbing a chapel and breaking a church should have his clergy; but it seems, it was with this difference, that if the ordinary refused him, as he might, he should not have his clergy. 20 E. 2. *Coron.* 289. *Stamf. P. C.* 123, 124, but otherwise the court would allow it him. 16 *Assiz.* 27.

CHAPTER XLVI.

WHERE AND IN WHAT OFFENSES, THAT WHERE CAPITAL AT COMMON LAW, CLERGY IS TAKEN AWAY IN PART OR IN ALL BY ACTS OF PARLIAMENT SUBSEQUENT TO 25 E. 3. AND FIRST, OF PETIT TREASON.

I HAVE before declared what capital offenses were exempt from clergy at common law, and how the law stood in relation thereunto before and by the statute of 25 E. 3. and have there settled it, that regularly in all capital offenses, except treasons, which touch the king, the offender is to have the privilege of his clergy.

But as touching treasons, that touch the king, by virtue of the common law and the declaration of that statute the benefit or privilege of clergy is not allowable, neither is there any statute, that hath altered the law in that point of treason, but it stands still excluded from the privilege of clergy.

But as to petit treason and felonies subsequent statutes have made great alterations as to the point of clergy from what was declared by the statute of 25 E. 3. *cap. 4. pro clero.*

The inquiry therefore touching the alterations made by subsequent statutes in point of petit treason and felony may be considered in this method.

1. What alterations have been made by acts of parliament in relation to new felonies made by acts of parliament since 25 E. 3. And

2. What alterations have been made in such offenses, as were petit treason or felony at the time of the making of that statute.

1. As to the former of these this general rule holds, that if an act of parliament make a felony, and doth [335] not take away clergy in express words, in all those cases clergy is allowable.

And if it doth make a felony and takes away clergy not generally, but in such or such cases, regularly in other cases clergy is allowable, as if it takes away clergy in case the party be convicted by verdict, yet he shall have his clergy, if he stand mute.

But if it enacts generally, that it shall be felony without benefit of clergy, or that he shall suffer as in case of felony, without benefit of clergy, this excludes it in all circumstances, and to all intents; and because I have before in the particular enumeration of felonies by act of parliament taken notice all along what are excluded of clergy and what not, I shall dismiss that

part of the inquiry referring myself to the several acts of parliament, that enact the felonies themselves; and shall proceed to the second part of the inquiry.

II. Therefore as to those felonies, that were such at the time of the statute of 25 E. 3. *cap. 4. pro clero.*

I shall first deliver some general positions, and then proceed to the particular felonies themselves.

1. Therefore it is certain, that whatsoever petit treason or felony there was at the time of the making of that statute, it was within the privilege of clergy by force of that statute at least, except those two above mentiond in the last chapter.

2. That therefore all such petit treasons and felonies are at this day within clergy, unless where it is ousted by subsequent statutes now in force.

3. That where any statute subsequent to 25 E. 3. *cap. 4.* hath ousted clergy in any of those felonies, it is only so far ousted, and only in such cases and as to such persons as are expressly comprised within such statutes, for *in favorem vitæ & privilegii clericalis* such statutes are construed literally and strictly.

And therefore, if clergy be ousted as to the principal, it is not ousted as the accessory; if as to the accessory *before*, it is not extended to the accessory *after*; if where the prisoner [336] is convict by verdict, it holds not as to a conviction by confession, nor as to an attainder by outlawry, nor to a standing mute, as we shall see in the subsequent instances.

4. That in all cases, where a subsequent act of parliament ousteth clergy in case of any felony, the indictment must precisely bring the party within the case of the statute, otherwise, altho possibly the fact itself be within the statute, and it may so appear upon the evidence, yet if it be not so alledged in the indictment, the party, tho convict, shall have his clergy. *Stamf. P. C. fol. 130. a. Dy. 99. a. 183. b. 224. b. 261. a.*

5. Altho the case be so laid in the indictment, that it comes within the statute to exempt the prisoner from clergy, yet if upon the evidence it fall out that, tho it be a felony, yet it is not so qualified, as laid in the indictment, the jury ought to find him guilty of the felony simply, but not as to the manner laid in the indictment, (as for instance guilty of the felony, but not of the robbery, or not of the breaking of the house,) and thereupon the prisoner shall be admitted to his clergy; and this is commonly done.

And now I come to the particular offenses, wherein clergy is taken away from such felonies, where by the common law and the statute of 25 E. 3. *cap. 4.* it was allowable.

And those offenses are these that follow.

1. Petit treason. 2. Murder. 3. Manslaughter. 4. Rape.

5. Robbery. 6. Burglary, 7. Larciny of several kinds and degrees.

And I shall now pursue them in the same order, as they are set down.

First, Petit treason, as the servant killing his master, &c.

It is plain, that after the statute of 25 E. 3. cap. 4. clergy was to be allowd until 12 H. 7. cap. 7. & 23 H. 8. cap. 1.

The first statute, that ousted clergy generally in petit treason, was that of 12 H. 7. cap. 7. which yet extended but to conviction or attainder, and only to the principal not to the accessory.

By the statute of 23 H. 8. cap. 1. it is enacted, "That no person, which shall be found guilty after the laws [337] of the land for any manner of petit treason, or wilful murder of malice prepensed, or for robbing any churches, chapels, or other holy places, or for robbing any person or persons in their dwelling house or dwelling place, the owner or dweller of the same house, his wife, children, or servants then being within, and put in fear or dread by the same, or for robbing any person or persons in or near the highways, or for wilful burning of any dwelling houses or barns, wherein any corn or grain shall happen to be, nor any person found guilty of any abetment, procurement, helping, maintaining or counselling of or to any such petit treasons, murders or felonies shall from henceforth be admitted to the benefit of clergy, except clerks in holy orders, viz. in the order of subdeacon or above; and that such persons in orders convict of those offenses shall be delivered to the ordinary, but shall remain in prison without purgation, unless he become bound by recognisance before the king's justices, where he was convict, with two sufficient sureties for his good behaviour.

"Persons attaind by judgment upon confession, outlawry, or verdict admitted to clergy to remain in prison without purgation.

"Clerks convict, and upon their clergy allowd deliverd to the ordinary may be degraded, and then sent into the king's bench by the ordinary to receive judgment upon their conviction, and the justices having the record before them shall give judgment upon such conviction, as if had not had clergy."

This act, tho temporary, was continued by the statute of 28 H. 8. cap. 1. and made perpetual by 32 H. 8. cap. 3. and by the same act persons in orders are put into the same condition, as other persons not in orders, notwithstanding this statute of 23 H. 8. cap. 1. or 25 H. 8. cap. 3.

This statute of 23 H. 8. as to all these crimes extended to principals and accessaries before the fact, but not to accessaries after.

But yet it extended to exclude principals and accessaries *before*, only in cases where they were found guilty after due course of law, *viz.* by verdict or confession, &c. and extended not to standing mute, &c. And therefore by the statute of 25 *H. 8. cap. 3.* it is enacted, "That every person that shall be indicted of petit treason, wilful burning of houses, murder, robbery, or burglary, or other felony according to the tenor or meaning of the said statute of 23 *H. 8.* and thereupon arraigned do stand mute of malice or froward mind, or challenge peremptorily above the number of twenty, or do not answer directly to the indictment and felony, whereof he shall be arraigned, shall be excluded from clergy in like manner, as if he had pleaded to the offense and been found guilty according to the laws of the land."

And provides, "That if any person be indicted in a foreign county for stealing of goods in another county, and be found guilty, stand mute, challenge above twenty peremptorily, or will not directly answer, he shall be excluded from clergy, as he should have been, if he had been arraigned for the robberies or burglaries in the same shire where they were done, if by examination it shall appear to the justices, that he had been indicted and arraigned in the county where the burglary was done, he should have been excluded from his clergy by the said statute, had he been found guilty there."

This statute was but temporary, because bottomed upon the statute of 23 *H. 8. cap. 1.* that was but temporary, but by the statute of 28 *H. 8. cap. 1.* was continued till the last day of the next parliament, and by the statute of 32 *H. 8. cap. 3.* made perpetual.

But hitherto in this case of petit treason, (and indeed generally in all these cases of the statute of 23 *H. 8.*) there were these defects.

1. That as to the principal the statute of 23 *H. 8. cap. 1.* did extend to appeals, as well as indictments for the offenses described in that statute, and if they were found guilty by verdict or confession, the appellee and accessory *before* were [339] excluded of clergy, but statute of 25 *H. 8. cap. 3.* extended only to indictments, and therefore an appellee standing mute, &c. was to have his clergy in the cases of the statute of 25 *H. 8. cap. 3.* Again,

2. Neither of these statutes extend, where the party is outlawed for these crimes.

3. As the law was then taken, challenging above twenty had been a conviction, or at least had put the party to his penance; but that I may observe it once for all, now that clause of challenging above twenty mentioned in the statute of

25 H. 8. and other statutes hereafter mentiond import nothing as to the point of clergy, for his challenge is over-ruled and he put upon the jury, as hath been before observed. (*)

But because the statute of 1 & 2 P. & M. cap. 10. in case of petit treason restores the peremptory challenge of thirty-five, it should seem, that if he challenge peremptorily above thirty-five, he shall have the benefit of his clergy, for it is now become *casus omissus*.

And therefore by the statute of 4 & 5 P. & M. cap. 4. "If any should maliciously command, hire or counsel any to commit petit treason, wilful murder, or to do any robbery in any dwelling house or houses, or to do any robbery in or near the highway, or to burn any dwelling house or any part thereof, or any barn then having any corn or grain in the same, then every such offender, 1. Being outlawd for the same, or 2. Arraigned and found guilty by order of law, or 3. Otherwise lawfully convict or attaind of the same, or 4. Who shall stand mute of malice or froward mind, or 5. Shall peremptorily challenge above twenty persons, or 6. Will not directly answer, is ousted of his clergy.

But *nota*, every indictment to oust the accessory *before* of his clergy must run *malitiosè*, otherwise he shall have his clergy. 2 Eliz. Dy. 183. b.

But now by the statute of 1 E. 6. cap. 12. it is enacted, "That no person, that hath been, or shall be in due form of law attaind or convict of murder of malice prepensed, or of poisoning of malice prepensed, or breaking any [340] house by day or by night, any person being then in the house, where the same breaking shall be committed, and thereby put in fear or dread, or of or for robbing any person or persons in or near the highways, or for felonious stealing of horses, geldings or mares, or for felonious taking goods out of any parish church or other church or chapel, or being indicted or appeald of any of the said offenses, and thereupon found guilty by twelve men, or shall confess the same upon his or their arraignment, or will not answer directly according to the laws of this realm, or shall stand wilfully or of malice mute, shall be admitted to have the privilege of clergy or sanctuary, but shall be put from the same, and that all persons in all other cases of felony, other than such as are before mentiond, which shall be arraigned or found guilty upon their arraignment, or shall not confess the same, or stand mute, or will not directly answer, shall have and enjoy the benefit of clergy and sanctuary, as they might have had before the 24th of April 1 H. 8."

This statute doth not restore clergy to the principal in case of petit treason, but leaves the law in relation thereunto, as it stood before, and upon the statutes of 23 & 25 *H. 8.* tho there be no word of *petit treason*, for if the opinion of *Walsh* and my lord *Dyer M. 6 & 7 Eliz. Dy. 235. a.* be law, viz. that a general pardon of all offenses except murder, doth not except petit treason, and so petit treason comes not within the expression of *felony*, then the clause, *that in all other cases of felony clergy shall be allowed*, doth not extend to allow clergy in petit treason.

But if that opinion be not law, (a) (as I think it is not) then the exclusion of clergy from murder by this statute excludes it also in petit treason.

But if it did not, yet it does not restore clergy in petit treason to the principal, (b) where found guilty or attaint, [341] because before 1 *H. 8.* clergy was taken away in petit treason from the principal by 12 *H. 7. cap. 7.*

Again, by the statute of 5 & 6 *E. 6.* taking notice that by the act of 1 *E. 6.* the act of 25 *H. 8. cap. 3.* touching robbers and burglars arraigned in a foreign county, and ousting them of clergy by examination stands repealed, whereby offenders were much emboldened, it is enacted, "That the said act made in the 25th year of King *H. 8.* touching the putting such offenders from their clergy, [and every article, clause and sentence contained in the same touching clergy] shall from henceforth touching such offenses from henceforth to be committed or done stand, remain, and be in full strength and virtue in such manner, as it did before the making of the said act in the said first year of King *E. 6.* any clause, article or sentence comprised in the said act of 1 *E. 6.* to the contrary thereof notwithstanding."

Now upon this act of 5 *E. 6. cap. 10.* it hath been taken, that not only the clause of the act of 25 *H. 8. cap. 3.* touching foreign felonies ousted of clergy upon examination, but the whole act of 25 *H. 8. cap. 3.* is re-enacted, and upon that account wilful burning stands by virtue of that act ousted of clergy, because ousted of clergy by 23 & 25 *H. 8.* tho no mention be made thereof in the statute of 1 *E. 6.* and accordingly resolved 11 *Co. Rep. 33. Alexander Poulter's case, de quo infra.*

Upon the whole matter it seems plain, that at this day in relation to petit treason the law stands thus.

(a) *Vide supra, Part I. cap. 29. p. 378.*

(b) The words here in the original MS. are [takes not away clergy from the principal.] but the scope of our author's argument plainly shews he intended to have wrote [does not restore].

1. The principal convict by verdict or confession is ousted of clergy by 23 *H. 8. cap. 1.* both in appeals and indictments.

2. The principal standing mute, or not directly answering is ousted of clergy by 25 *H. 8. cap. 3.* in cases of indictment, but not in case of an appeal; and the statute of 1 *E. 6. cap. 12.* doth not alter the case as to the principal in petit treason.

3. Yet I see no provision to oust clergy of a clerk attaint of petit treason by outlawry, but that he may claim his clergy and be deliverd to the ordinary, as a clerk attaint [342] without purgation, for this is not provided for, as it seems by these statutes.

4. But in my opinion the statute of 1 *E. 6. cap. 12.* taking away clergy from persons attaint, as well as from persons convict of murder doth extend to petit treason, which is in truth murder, and consequently a person outlawd of petit treason, tho not by the statutes of 23 or 25 *H. 8.* yet the statute of 1 *E. 6.* is exempt from clergy under the name of wilful murder.(c)

And the statute of 4 & 5 *P. & M. cap. 4.* taking away clergy from accessary *before* in case of petit treason, where attainted by outlawry, had committed a great piece of absurdity in putting the accessary in a worse case than the principal, unless the law had been taken, that the statute of 1 *E. 6. cap. 12.* had taken it away from the principal in the like case of outlawry, which is an attainer in law.

5. As to the accessary before the fact, he is ousted of clergy in all the cases before mentiond by the statute of 4 & 5 *P. & M. cap. 4.* and so the law stands at this day, but it must be laid *malitiosè. 2 Eliz. Dy. 183. b.*

6. But the accessary after the fact hath his clergy in all cases in petit treason, for no statute takes it from him.

I have been the longer in this, because it was necessary to take notice of the series of all the statutes, and to disintangle them, and it will serve for the briefer collection of what follows in other cases.

(c) If this statute be construed to take away clergy from petit treason, it takes it away, as well in case of an appeal, as of an indictment, not only where the party is convict by verdict or confession, but also where he will not answer directly, or shall stand wilfully mute.

CHAPTER XLVII.

CONCERNING THE ALTERATION MADE BY SEVERAL STATUTES
IN CASES OF MURDER, MANSLAUGHTER, RAPE, AND WILFUL
BURNING OF HOUSES OR BARNS WITH CORN.

I. I SHALL briefly consider how the privilege of clergy stands as to *murder*, and therein.

1. At the common law, and by the statute of 25 *E. 3. cap. 4.* clergy was to be allowed as well in murder, as any other felony.

2. Tho there were some particular statutes, that in particular cases took away clergy in case of heinous murders,^(*) yet the first general law, that took away clergy in case of wilful murder *ex malitiâ præcogitatâ* generally was 23 *H. 8. cap. 1.* which extended only to a conviction by verdict or confession, and included accessaries *before*, and extended to appeals, as well as indictments.

3. The statute of 25 *H. 8. cap. 3.* extended only to indictments but not to appeals; to principals and not to accessaries *before* or after.

4. But the statute of 1 *E. 6. cap. 12.* took away clergy from principals in murder in all cases, *viz.* conviction by verdict or confession, attainder by outlawry or otherwise, standing mute, or not directly answering,^(a) but this statute of 1 *E. 6.* extended not to accessaries.

5. By the statute of 4 & 5 *P. & M. cap. 4.* all that [344] shall maliciously command, hire, or counsel any to commit any wilful murder are ousted of clergy in all cases.

6. But accessaries to murderers after the fact have their clergy in all cases.

So that the principal stands at this day ousted of clergy in all cases, and the accessory *before* is also ousted of clergy in all cases, but the accessory *after* is in no case ousted of clergy.

(*) *Vide* 12 *H. 7. cap. 7.* 4 *H. 8. cap. 2.* 23 *H. 8. cap. 9.*

(a) This statute omits the case of challenging above twenty, but this our author thinks unnecessary to be inserted, because since 22 *H. 8. cap. 14.* neither penance nor judgment of death is to follow in that case, but only the challenge is to be over-ruled, *vide supra* p. 270. & *infra* cap. 48. however this omission is supplied by 3 & 4 *W. & M. cap. 9.* as to indictments.

But it must be remembered, that the party indicted must be brought within the very letter of the statute.

If the indictment be *felonice & ex malitiâ suâ præcogitatâ interfecit*, yet he shall have his clergy, because there wants the word *murdravit*. *Dy. 261. a.*

So if it be *felonice interfecit & murdravit*, and says not *ex malitiâ suâ præcogitatâ*, it is but an indictment of manslaughter, and the prisoner shall have his clergy.

So if a man be indicted, as accessory before, *viz. quodd præcepit*, and says not *malitiosè præcepit*. *P. 2. Eliz. Dy. 183. b.*

II. As to *manslaughter*, regularly in all cases the person indicted or appealed ought to be admitted to his clergy.

But if *A. B. and C.* be indicted specially upon the statute of 1 *Jac. cap. 8.* setting forth, (as the indictment must) "That *A. felonice pupugit & percussit D.* not having any weapon drawn, nor having stricken first, and that *B. and C.* were present, aiding and abetting," tho' *A. B. and C.* are all principals in manslaughter at common law, yet *A.* only, that gave the stroke, shall be ousted of his clergy. *H. 23 Car. 1. B. R. Page's case. (b)*

And therefore it seems in that case, if it be found, that *A.* gave not the stroke, but *B.* and that *A. and C.* were aiding and abetting, not only *A. and C.* that gave not the stroke shall have their clergy, but also *B.* because, tho' the case of *B.* is within the statute, yet as to him the indictment brings him not within the statute, and so differs from the case of a general indictment of murder, where tho' it be laid, that *A.* gave the stroke, and *B.* was present, aiding and abetting, yet if upon [345] the evidence it appears, that *B.* gave the stroke, and *A.* was abetting, &c. both shall be convict of murder, for both are equally murderers, and the indictment is true as to both *quodd ex malitiâ suâ præcogitatâ interfecerunt & murdraverunt. (*)*

By the statute of 1 *Jac. cap. 8.* clergy is ousted as to him that so stabs upon any conviction by verdict, confession or otherwise, and that as well in case of an appeal as of an indictment; but it extends not to standing mute or not directly answering, for there is no conviction in that case, and so it seems as to an outlawry. (c)

III. As to *rape*, by the statute of 18 *Eliz. cap. 7.* If any man be convict thereof by verdict or confession, or be outlawd for the same, he is excluded of clergy, but this act extends not

(b) *Styl. 86. q*

(*) *Vide supra p. 292. 1 Salk. 334.*

(c) But in all these cases the offender is excluded from clergy by 3 & 4 *W. & M. cap. 6.* upon an indictment, but not in an appeal.

to a standing mute or not directly answering, for this is *casus omissus*,^(d) and he shall have his clergy 11 *Co. Rep.* 35. *b. Poultter's case.*

But at this day in all cases challenging above twenty makes nothing either for or against clergy, for the party shall not be put to his penance nor be convict thereupon, but only his challenge shall be over-ruled and he put upon his trial, as hath been before observed,^(†) and therefore the clause in the act of parliament ousting clergy, where he challengeth above twenty, or the not mentioning of that clause makes nothing at this day one way or another as to the point of clergy.

But neither accessaries *before* or *after* are upon this statute exempt from the privilege of clergy.

IV. As to the case of *wilful burning*.

It stands now a settled point, that if the principal be convict by verdict or confession, or stand mute, or will not directly answer, he shall not have his clergy, this is the point resolved 11 *Co. Rep.* 35. *a. Poultter's case*, and the constant practice is, and always hath been accordingly.

And the statute of 4 & 5 *P. & M. cap.* 4. strongly [346] proves the law to be so, for clergy is taken away from the accessary *before*, and it were a strange oversight, if an act of parliament should exempt the accessary from clergy in this case, and yet the principal should have the benefit of it.

That which caused the doubt was the statute of 1 *E. 6. cap.* 12. where it enumerates all the offenses, which were then to be exempt from clergy, and mentions not the case of wilful burning and enacts, "That in all other cases of felony the offenders shall have clergy, as they should have had before 1 *H. 8.*" and the first statute that took away clergy from wilful burning of houses or barns with corn was a statute made after 1 *H. 8. viz.* 23 *H. 8. cap.* 1. & 25 *H. 8. cap.* 3.

There have been three answers given hereunto,^(*) *viz.*

1. That this was a felony, that even by the common law before 1 *H. 8.* was exempt from clergy, being an act of hostility, and this I remember was given by *Noy* attorney general about 9 *Car.* 1. but possibly this may be doubtful as to the fact, whether at common law clergy were not allowable upon this offense, and if it were not, yet it is a greater doubt, whether that law were not altered by the act of 25 *E. 3. cap.* 4. *pro clero*, wherein clergy was settled in all cases,

^(d) But this is provided for in case of an indictment by 3 & 4 *W. & M. cap.* 9.

^(†) p. 270.

^(*) *Vide Part I. p. 570, &c.*

except treasons or felonies that touch the king or his royal dignity.

2. Others have agreed, that clergy was taken away in these cases of wilful burning by the statutes of 23 H. 8. cap. 1. and 25 H. 8. cap. 3. and consequently this offense not being enumerated in the statute of 1 E. 6. cap. 12. is by the general concluding clause of that statute restored to the benefit of clergy: But then they think, that by the statute of 5 & 6 E. 6. cap. 10. the statute of 25 H. 8. cap. 3. is wholly revived, and consequently now the repeal of the exemption of clergy in case of wilful burning is repealed by the revival of the statute of 25 H. 8. cap. 3. by the subsequent statute of 5 & 6 E. 6. cap. 10. and thereby exemption from clergy in case of wilful burning is again established.

But this hath in it many difficulties. 1. It seems by the whole scope of the preamble and the strict [347] penning of the body of the act of 5 & 6 E. 6. cap.

10. that that act revived only so much of the act of 25 H. 8. cap. 3. as concerns the ousting of felons of their clergy upon examination, where robberies or burglaries were committed in foreign counties. 2. Again, the statute of 25 H. 8. took away clergy from wilful burning, only in cases of indictment, and that only where the prisoner stands mute, answers not directly, or challengeth above twenty, but the ousting of clergy in case of appeals, as well as indictments upon conviction by verdict or confession stood purely upon the statute of 23 H. 8. cap. 1. which is no where revived as to the point in question, and yet that is the case, that must most ordinarily occur, namely, where the party is convict.

3. Therefore the last and I think the surest answer as to this difficulty is, that the statute of 3 & 4 P. & M. cap. 4. taking away clergy in all cases from him that maliciously commands, hires, or counsels the wilful burning of any dwelling-house or barn with corn, in all cases of conviction, attainder, standing mute, outlawry, peremptory challenge of above twenty, or not directly answering, doth by necessary consequence take away clergy in all these cases from the principal offender in such wilful burning.

But *quæcunque videt datâ* the law stands settled, that clergy is taken away in all cases from the principal in wilful burning of a dwelling-house or a barn with corn, *quod vide* 11 Co. Rep. *Alexander Poulter's case per totum.*

And therefore I can by no means think, that outlawry of the principal in this offense is within the privilege of clergy, for the

accessary even in that instance is exempt from(e) clergy by 4 & 5 P. & M. cap. 4.

Now as touching the accessary by the statute of [348] 4 & 5 P. & M. cap. 4. they that shall maliciously command, hire, or counsel this fact, viz. accessaries before, are exempt from the benefit of clergy in all cases.

But accessaries after are within the benefit of clergy in all cases.

CHAPTER XLVIII.

CONCERNING CLERGY IN ROBBERY FROM THE HOUSE, OR ROBBERY FROM THE PERSON.

ROBBERY is of two kinds, from the person, and from the house of another.

First, Robbery from the person is a violent assault upon the person, and felonious and violent taking away his goods putting him in fear.

The principal in case of robbery in or near the highway is ousted of his clergy, viz.

1. By the statute of 23 H. 8. cap. 1. "Where he is convicted by verdict or confession, whether it be in an appeal or an indictment."

2. By the statute of 25 H. 8. cap. 3. "In an indictment, where the party stands mute, will not directly answer, or challengeth above twenty."

And in case the robbery were in or near the highway in the county of *A.* and he carry the goods into the county of *B.* and there be indicted of larceny, and upon examination it appears it was such a robbery in the county of *A.* that had he been indicted in the county of *A.* he should have been ousted of his clergy by the statute of 23 H. 8. cap. 1. the justices of the county of *B.* shall oust him of his clergy in the county of *B.* whether he be convicted, stand mute, challenges above twenty, or answers not directly.

And tho this clause be repealed by the statute of 1 E. [349] 6. cap. 12. it is again revived by 5 & 6 E. 6. cap. 10. and stands now in force as to all robberies, where the

(e) The MS. has it [is subject to] but both the statute and the sense require it should be [is exempt from.]

party, if convict, is to be ousted of his clergy by the statute of 23 H. 8. *cap.* 1.

But it extends not to any felony, where clergy is ousted by any statute after 23 H. 8. *Co. P. C. cap.* 50. *p.* 115. *Stamf. P. C. fol.* 128. *a.* (*)

If *A.* commits a robbery near the highway in the county of *B.* and takes away but to the value of 6*d.* yet if indicted for robbery in the county of *B.* he shall have judgment of death without benefit of clergy, but if he carry those goods into the county of *C.* and there is indicted and pleads, and the jury find him guilty to the value of 6*d.* tho upon the evidence it appears that it was a robbery in the county of *B.* yet he shall not have judgment of death, because as it now stands, it is but petit larceny, (a) where the prisoner is not to have his clergy but to be whipt, and the examination given by the statute of 25 H. 8. is only to oust clergy, where demandable. *M. 31 Eliz. Moore's Rep. n.* 739. *p.* 550.

If a man be indicted for a robbery *in viâ regiâ*, (†) or *in altâ viâ*, or *in altâ viâ regiâ*, and be convict, he shall be ousted of his clergy by the statute of 23 H. 8. but if it be laid to be *in viâ regiâ pedestri ducent' de London ad Islington*, tho he be convict, he shall have his clergy; adjudged 38 H. 8. *Moore's Rep. n.* 16. *p.* 5.

But in that case it might have been laid *propè altam viam regiam*, and he should have been oust of his clergy, for the words of the statute are *in or near* the highway.

If a man be robbed upon the river *Thames*, or other public river within the body of a county, this is a robbery upon the king's highway, and may be so laid in the indictment, and the party shall be ousted of his clergy upon these statutes, and so it was agreed in *Hide's* case at *Newgate*, *M. 23 Car. 2.*

for the public streams are highways, and therefore they [350] are called *hault streames le roy*.⁴

But this statute of 25 H. 8. extends not to standing mute, or not directly answering in an *appeal*, but only in an *indictment*, and therefore,

3: The statute of 1 E. 6. *cap.* 12. ousts such robbery of clergy as well in an *appeal* as indictment, where the offender stands mute, or will not directly answer.

(*) *Vide Part I. p.* 518. But by 3 & 4 W. & M. *cap.* 9. the like clause is enacted as to all felonies, wherein clergy was ousted by that or any other statute.

(a) *Vide Part I. p.* 536.

(†) According to what our author says *Part I. p.* 535. if the indictment be laid only *in viâ regiâ*, this will not be sufficient to oust clergy.

⁴ *Vide Part I. p.* 536.

But mentions nothing of challenging peremptorily above twenty, neither need it, for, as hath been said, (†) he shall be only put from his challenge, and the jury shall be charged to pass upon him, and no conviction or *peine fort & dure* shall ensue upon his peremptorily challenging above twenty, as the law now stands.

But whereas *Stamf. Lib. II. cap. 42. fol. 129. b.* affirms, "That upon all these statutes, and in all the cases mentioned in them there are two cases, wherein the offender in murder, robbery, &c. shall have his clergy, namely, where the offender is outlawed, or convict by battle," it is not true of the former, for outlawry is an attainder, and tho 23 H. 8. & 25 H. 8. speak neither of outlawry nor attainder, yet the statute of 1 E. 6. cap. 12. saith, if any person be *attaint* or convict of murder, &c. he shall be ousted of clergy.

And the same law it is, if the appellee of robbery be vanquished in an appeal, for he is thereby *convict*, and the statute doth not mention only a conviction by twelve men, but *any person in due form of law attaint or convicted of murder, &c.*

And thus far concerning principals.

As touching accessaries by malicious commanding, hiring or counselling any such robbery, they are ousted of clergy by 4 & 5 P. & M. cap. 4. in all cases, namely being convict, standing mute, not directly answering, or outlawed, &c.

But accessaries *after* having the benefit of clergy in all cases.

Secondly, As touching a robbery from the house of any person.

This divides itself into these several heads.

1. Robbing in the dwelling house, the owner, his [351] wife or family in the house and put in fear.

2. Robbing in the dwelling house, *any person* being in the house and put in fear.

3. Robbing in the house or tent, the owner, his wife, or servants being in the house, tho not being put in fear.

4. Robbing a house, and no person being therein.

As to these in their order.

1. Robbing any person in his dwelling house or dwelling place, the owner or dweller, his wife, children, or servants being within the same and put in fear or dread by the same.

By the statute of 23 H. 8. cap. 1. as well in an appeal as an indictment, the principal and accessory before the fact are ousted of clergy in two cases, namely,

1. If convict by verdict. 2. If convict by confession.

By the statute of 25 H. 8. cap. 3. there is farther provision

(†) *Supra*, p. 270.

made, but only in case of indictment, not of appeal, and only against the principal, but not the accessory *before or after, viz.*

1. If the principal stand mute of malice or froward mind. 2. If he challenge above twenty peremptorily. 3. If he will not directly answer.

There is farther provision made for ousting of clergy, where robbers of houses carry the goods into another county and be there indicted of larciny, if upon examination they should be ousted of clergy, had they been indicted in the first county; but, as hath been before observed,

1. This ousting of clergy by examination in a foreign county refers only to such robbery, as by the statute of 23 *H. 8. cap. 1.* is ousted of clergy, namely, where the owner, his wife, children, or servants are then in the house and put in fear, not to such robberies, as by acts of parliament made since are put out of clergy. 2. In case of an arraignment in a foreign county, if the goods prove to be but of the value of 12*d.* here is no clergy to be demanded or allowd, being but petit larciny, and therefore no ousting of clergy by examination.

Dorothy Cole(*) was indicted in *Sussex* for stealing goods, upon the evidence it appeared, that she broke a [352] house in *Kent*, and brought the goods into *Sussex*, the jury found the goods to be of the value but of 7*s.* yet in as much as there was no putting in fear of the owner, his wife, or family, she was to have the benefit of the statute of 21 *Jac.* and could not be ousted of it by examination, for tho by the statute of 39 *Eliz. cap. 15.* clergy was taken away, yet the taking away of clergy upon examination in a foreign county extends only to robberies where clergy is taken away by 23 *H. 8.* but if it had been with a putting in fear, so that in case of a man he should have been ousted of his clergy, it deserves consideration, whether the woman, if under 10*s.* should have been ousted of the benefit of the statute of 21 *Jac. cap. 6.* by examination, tho originally it were a burglary and robbery. *Sed de hoc infra.*

But these statutes did not extend to any such robbery, where 1. There was no putting in fear. 2. Where the owner, his wife, children or servants were not in the house, but only a stranger were there and put in fear. 3. Neither did they extend to one attaint by outlawry or battle. 4. The statute of 25 *H. 8.* extended not to appeals.

As to the accessaries before the fact, by the statute of 4 & 5 *P. & M. cap. 4.* it is enacted, " That if any shall command, hire, or counsel any person to do any robbery in any dwelling house

(*) *Vide Part I. p. 518.*

or houses, they shall be excluded from clergy in all cases, *viz.* convict, outlawd, standing mute, &c.

Upon this statute these things are observable.

1. It requires an actual robbing, *viz.* taking away some goods; a bare breaking of the house is not sufficient.

2. It extends to a robbing, without mentioning *put in fear*.

3. It extends to outlawry, which 23 or 25 H. 8. extended not to.

4. It extends to appeals as well as indictments; but accessory *after* are in no case excluded from clergy.

II. Robbing of any person by day or night, any person [353] being then in the same house, and put in fear or dread thereby.

By the statute of 1 E. 6. cap. 12. clergy is taken away in all cases, *viz.* if he be attaint by outlawry or otherwise, convict by verdict, confession, or wager of battle, stands mute, or will not directly answer: And this as well in appeals as indictments.

It is true, it mentions not peremptory challenge of above twenty, neither is it material for the reason before given.

But this statute, tho it speaks generally of breaking a house by day or by night, hath had this construction always allowd, *viz.*

If the breaking of the house be in the night, then it must be such a breaking as amounts to burglary, *viz.* with an intention to commit a felony, and then it ousts clergy; if it be with a putting in fear.

If it be a breaking the house in the day-time, then it must be also a breaking, as hath an actual robbery joined with it, and then if there be a putting in fear also, the clergy is ousted in all the cases mentiond in this statute.

But in both cases there must be a putting in fear, otherwise this statute ousts not clergy.

This statute therefore hath made these additions to the statutes of 23 & 25 H. 8. *viz.* 1. It exempts burglary from clergy, tho there be no robbery, if there be a putting in fear. 2. If there be a burglary in the night, or robbery in the day committed in the house, and any stranger be then in the house and put in fear, it excludes from clergy, tho it be not the owner or any of his family. 3. It excludes the principal from clergy in all cases, where he is not excluded by any of the two former statutes. (b)

But again on the other side, it restores clergy to the accessory before the fact, tho convict by verdict or confession, and repeals so much of the statute of 23 H. 8. as excludes the accessory *before* from clergy. But as hath been said, the sta-

(b) *Viz.* in case of attainder by outlawry, and also in case of standing mute, or not directly answering in an appeal.

tute of 4 & 5 P. & M. cap. 4. takes off the clergy again from accessaries where there is a robbery and a putting in fear, but not where there is only a burglary with a putting in fear, but without robbery; but accessaries *after* in all cases have their clergy.

III. If any person be found guilty of robbing any person in any part of his dwelling house or dwelling place, the owner or dweller of the same house, his wife, children, or servants then being within the same, or in any other place within the precinct of the same house or place, such offender shall not be admitted to his clergy, whether such dweller or owner, his wife or children then and there being shall be sleeping or waking. 5 & 6 E. 6. cap. 9.

And the same provision is made for excluding clergy, where a person shall commit a robbery in a booth or tent in any fair or market, the owner, his wife, children or servant being then in the same booth sleeping or waking.

Upon this act we are to observe,

1. There must be an actual breaking of the house, such a breaking as would make a burglary if committed in the night, and the indictment must run *fregit & intravit dominum mansionalem* J. S. *præfato* J. S. *uxore & liberis suis in eadem domo existent'*, and such a breaking of the house must be provided in evidence: *vide supra, Lib. I. cap. 44. p. 532.*

2. The alleging of such a breaking of the house is sufficient to bring him within the statute to oust him of his clergy, if it be proved, tho it be not alleged by the way of robbery, *viz. violentè & à personâ*, but only *è domo prædictâ*, for it counter-veils a robbery within this statute.

If the servant steal goods out of his master's house in the day or night, the master, his wife and children being in the house, the servant is not to be ousted of clergy by this statute, for here is no breaking of the house.

If the servant unlatch a door, or turn a key in a door in the house and steal goods out of that room, tho if he had been a stranger, that had not to do in the house, he should hereupon be ousted of his clergy, yet it seems to me the servant shall not be thereupon ousted of his clergy, for the [355] opening the door in this manner is within his trust and so no breaking of the house, nor robbery within this act, and the same law seems to be upon the statute of 39 Eliz. cap. 15.

But if the servant break open a door, whether outward or inward, (as for the purpose a closet study, or counting-house,) and steal goods, this is a robbery and breaking the house within this statute, as also within the statute of 39 Eliz. for such a

breaking, tho by a servant in the night, would make burglary, for such an opening is not within his trust.

3. But there must not only be a breaking of the house, the owner, his wife, children or servants being within the same, but there must be also a felonious taking of the goods out of the house to exclude clergy by this statute.

4. But a bare felonious taking of goods out of the house, whether by night or day without such a breaking, as would make burglary, if done in the night, excludes not from clergy within this statute.

5. This statute both as to robbery in dwelling houses or booths requires, that the dweller or owner, his wife, children, servants or servant be then within the house; so that the being of a stranger in the house excludes not clergy no more than upon the statutes of 23 H. 8. cap. 1. *Stamf. P. C. fol. 129. b.*

6. It extends to no other case, but where the party is found guilty, viz. either by verdict or confession, and not to outlawry, standing mute, or not directly answering, therefore in all these cases the offender shall have his clergy. (c)

7. It extends to an appeal, as well as indictment.

8. It doth not exclude accessaries neither *after* nor *before* from clergy.

Neither doth the statute of 4 & 5 P. & M. cap. 4. extend to accessaries in this case, but only where robbery is committed, and any person within the house put in fear.

So that upon this statute all accessaries to the felony described by this statute are to have their clergy.

[356] IV. Robbing from the house goods to the value of 5s. in the day-time, no person being in the house.

By the statute of 39 Eliz. cap. 15. it is enacted, " That if any person be found guilty by verdict, confession, or otherwise for the felonious taking away in the day-time of any money, goods or chattels of the value of 5s. or upwards in any dwelling house or houses, or any part thereof, or in any outhouse belonging or used with the said dwelling house, altho no persons shall be in the said house or outhouse at the time of the felony committed, such persons shall be excluded from their clergy.

1. Altho this statute speak only of *felonious taking* in the body or purview, yet inasmuch as in the preamble it speaks of *robbery* of houses, a bare taking of goods out of a house, no body therein, without an actual breaking of the house, such as would make burglary were it in the night, is not such a taking out of a house, as excludes from clergy, and thus it hath con-

(c) But by 3 & 4 W. & M. cap. 9. clergy is taken away in these cases also.

stantly obtained in practice against the opinion in *Popham's Reports*. *Bayne's* case. (d)

2. The indictment must run according to the statute, viz. *quodd tempore diurno, scilicet inter horas &c. domum mansionalem J. S. fregit & intravit nullâ personâ in eâdem domo tunc existente, & ibidem &c. in eâdem domo inventa adtunc & ibidem felonice furatus fuit, cepit & asportavit*, for breaking the house in the day without taking goods is no felony. 11 *Co. Rep.* 36. a. b. *Poulter's* case.

And if upon the evidence it fall out, that it was in the night, or that any person was in the house at the time, or that he stole, but broke not the house, he shall be found guilty of a simple felony and have his clergy, but not guilty according to the statute. (e)

But there need not either in this case, or upon the [357] statute of 5 & 6 *E. 6.* above-mentiond be a formal mention of a robbery, as is used in an indictment for robbery from the person, for *fregit domum* imports it.

3. It takes away clergy only from the principal, and that only where the person is convict by verdict, confession, or otherwise, and therefore excludes not clergy, where the party stands mute, or is outlawd, (f) or will not directly answer, nor from the accessory. 11 *Co. Rep.* 36. b. *Poulter's* case.

4. If a man break the house in the day-time with intent to steal, but steals nothing, this is no felony, but otherwise in case of breaking the house in the night with intent to steal, this is burglary 11 *Co. Rep.* 31. b. *Poulter's* case.

If a man enter by the doors or windows open and steal goods, this excludes not clergy upon this statute, nor upon the statute of 5 & 6 *E. 6. cap. 9.* for it must be such an act to make a robbery within either of these statutes, as would make a burglary, were it in the night; it must be *fregit & intravit*.

And therefore the constant use at *Newgate* is, and always hath been upon these statutes, that if a man enter the doors being open, and breaks open a chest and steals goods to the value of 5s. this shall not oust him of his clergy within this statute, or the statute of 5 & 6 *E. 6. c. 9.* (g)

(d) This case therefore was not esteemed to be law, *Kel.* 68. but now by 10 & 11 *W. 3. cap. 23.* clergy is taken away from all, who shall by night or day privately and feloniously steal to the value of 5s. in any shop, ware-house, coach-house or stable, or by 12 *Ann. cap. 7.* to the value of 40s. in any dwelling house or outhouse thereto belonging, altho it be not broken, nor any person therein.

(e) But these cases are now provided against by 10 & 11 *W. 3. & 12 Ann.* above-mentiond. *Vide Part I. p. 564. in notis.*

(f) These cases are since taken in by 3 & 4 *W. & M. cap. 9.* by which statute clergy is also taken away from all who comfort, aid, abet, assist, counsel, hire, or command.

(g) *Vide Part I. p. 523, 524, 527, & Kel. 69.*

But if a man enters an house the outward doers being open, and when he is in the house, breaks open, or unlocks or unlatcheth an inward door and steals goods out of the room to the value of 5s. he shall be ousted of his clergy upon this statute, the same being done in the day-time no body being in the house; or if he steals goods of any value out of that inward room so opened by day or by night, the owner of the house, his wife, children, or servants being in the house, he shall be ousted of his clergy, being indicted upon the statute of 5 & 6 E. 6. cap. 9.

T. 16 Car. 2. *Simpson's case*(h) at Cambridge as-
[358] sises. A. being indicted upon the statute of 39 Eliz.

it was found by special verdict, that A. breaking into the house by day, no body being in the house, and breaking open a chamber-door and a chest, took out goods to the value of 5s. and laid them on the floor, and before he could carry them out of the house was taken: By the advice of all the judges of England he was ousted of his clergy upon this statute, for the taking them out of the chest was felony, and the statute doth not alter the felony, but excludes from clergy, if it were done in the house, and of the value of 5s. and none in the house.

Trin. 13 Car. 1. *Evans & Finch*(i) were indicted, for that they *tempore diurno, viz. circa horam* 12 did break *domum mansionalem* Hugonis Audley in the Inner-Temple London, *nullā personā in eādem domo existente*, and stole thence 40s. Upon a special verdict found in this case, these points were resolved.

1. That a chamber in an inn of court is *domus mansionalis* within this statute.

2. That if no body were in the chamber at the time, tho others were in other chambers of the temple, yet this was a breaking of the *domus mansionalis* Hugonis Audley *nullā personā in eādem domo existente*, and maintains the indictment.

3. Because only one of the persons indicted did actually

(h) According to this state of the case here was a breaking not only of a chest, but also of a chamber-door, which is on all hands agreed to be an act sufficient to make a robbery within the statute, and so the difficulty removed, which arises from this case, as stated above Part I. p. 524 & 527, and indeed as that case is reported in *Kelyng* p. 31. and in *hoc libro* Part I. p. 508. & p. 526. the question about the chest or trunk seems to have been only with relation to the taking away, whether the taking goods out of a chest and laying them on the floor without carrying them out of the chamber was a taking away or stealing within the statute, and not whether it was a robbery, for if it were a stealing, that would be clear by the breaking open the chamber-door.

(i) *Cro. Car.* 473. *vide* Part I. p. 527. 556.

enter the chamber and took out the money, *viz. Evans*, and the other stood without upon the ladder and received it, *Evans* was excluded his clergy, and the other who stood upon the ladder and received the money had his clergy.

And possibly the same law may be upon the statute of 5 & 6 *E. 6. cap. 9.* that he only, that enters the [359] house in the day-time without putting in fear, and actually takes the goods shall be excluded from clergy, and those, that stand without the house and are present and abetting, tho all principals, yet shall have their clergy, for I can see no difference in the cases; *quære tamen.* (k)

But if it were a burglary, then as well those without, that were present and assisting, as those within, shall be excluded from clergy by the general words of the statute of 18 *Eliz. cap. 7. they that commit any manner of burglary*; and the like in rape and in murder.

And so I do take it without any difficulty, if *A. B. & C.* come to commit a robbery upon the person of a man, and *A.* only takes the money from the person, and *B.* and *C.* are present and assisting, or if they break a house in the day-time and commit a robbery in the house putting in fear, tho *A.* only enters the house, and *B.* and *C.* watch without, they shall be all excluded from clergy, for they are all robbers.

And if it should be otherwise, this great absurdity would follow, that *B.* and *C.* that are present, aiding and assisting in the robbery, should have a greater privilege, where they are present and so principals in the felony, than they should have had, if they had been absent, and only accessaries before the fact, in which case the statute of 4 & 5 *P. & M. cap. 4.* excludes them from clergy in all cases.

(k) This doubt is now at an end, for by 3 & 4 of *W. & M. cap. 9.* clergy is excluded from all aiders, abettors, &c.

CHAPTER XLIX.

CONCERNING CLERGY IN BURGLARY.

BURGLARIES may be of two kinds. 1. Simple burglary, that hath no robbery joined with it. 2. Burglary, that hath robbery or theft joined with it.

I. The former of these is, when a man in the night-time breaks and enters a house to the intent to commit a robbery, theft, or other felony.

And this, as it had the benefit of clergy by the common law and by the statute of 25 E. 3. cap. 4. *pro clero*, so it was not ousted of clergy neither by the statute of 23 H. 8. nor the statute of 25 H. 8. but the first statute that ousted clergy in burglary was 1 E. 6. cap. 12.

This simple burglary is again of two kinds. 1. Where any person is in the house and put in fear or dread. 2. Where no person is put in fear or dread, as possibly where no person is in the house, which yet taketh not away the offense of burglary. *Popham's Rep.* 42 *per omnes justiciarios Angliæ*, or if any person being in the house, yet is sleeping and perceives not the burglary till the next morning, &c.

1. In the *first* of these cases of simple burglary, namely with putting in fear or dread, the statute of 1 E. 6. cap. 12. takes away clergy from the principal in all cases, *viz.* tho attaint by outlawry or otherwise, or convict, or standing mute, or not directly answering, as appears by the statute itself, and the interpretation made of it. *Stamf. P. C. fol. 126. a.* 11 *Co. Rep. Poulter's case.*

But clergy is not taken away from accessaries *before* or *after* by this or any other statute, for as to the statute of 4 & 5 P. & M. tho it take away clergy from those, that maliciously command, or hire, or counsel any person to do any robbery in any dwelling house, yet unless there be a robbery in the dwelling house, as well as a burglary, it takes not away clergy [361] from the accessory *before*, (a) nor at all from the accessory *after*.

2. As to the *second* kind of simple burglary without putting in fear, the statute of 18 Eliz. cap. 7. generally takes away clergy from all persons that shall commit any manner of burglary in three cases. 1. If he be outlawed for it. 2. If he shall

(a) But by 3 & 4 of W. & M. cap. 9. clergy is taken away from the accessory before the fact.

be found guilty of it by verdict, or 3. If upon his arraignment he shall confess it.

But in all other cases of standing mute, or not directly answering he is to have his clergy. (*)

And therefore, if a man be generally indicted of burglary without pursuing the statute of 1 E. 6. cap. 12. viz. without alleging in the indictment, that the owner, his wife, children or servant were in the house and put in fear, the prisoner standing mute, or not directly answering shall have his clergy, (namely, where the indictment is general,) notwithstanding the statute of 18 Eliz. cap. 7.

But the accessaries as well *before* as *after* are within privilege of clergy, for neither this nor any other statute hath excluded them. (a)

II. But now as to burglary joined with larceny or robbery in the dwelling house, this again is of two kinds, either with putting in fear, or without putting in fear.

If with putting in fear, then by the statute of 23 H. 8. cap. 1. & 25 H. 8. cap. 3. the owner or dweller, his wife, children, or servants being within the house and put in fear, the offender is ousted of his clergy, not upon the account of the burglary simply considered, but upon the account of the robbery, if the party be found guilty by verdict or confession, or stand mute, or will not directly answer.

But by the statute of 1 E. 6. cap. 12. he is excluded from clergy in all cases, if any person were in the house and put in fear.

And altho as to the accessaries *before*, the statute of E. 6. cap. 12. restores clergy unto them, yet by the [362] statute of 4 & 5 P. & M. cap. 4. clergy is in this case taken away from accessaries before the fact, viz. counsellors or commanders to do any robbery in a mansion-house are ousted of clergy in all cases.

But if it were a burglary joined with robbery of goods out of the house, whether the party were put in fear or not, the principal is ousted of clergy by the statute of 18 Eliz. cap. 7. upon the single account of the offense of burglary, (if the offender be outlawed or convict by verdict or confession,) for that statute as to the point of clergy is not at all concerned as to the robbery, but singly upon the account of burglary the clergy is ousted, tho he be acquit of the robbery or larceny.

But then as to the accessaries before the fact it is considerable,

(*) By the said statute of 3 & 4 of W. & M. clergy is taken away also in cases of standing mute, or not directly answering.

(a) But by 3 & 4 of W. & M. cap. 9. clergy is taken away from the accessory before the fact.

whether in burglary joined with robbery without putting in fear the accessory shall be ousted of clergy by the statute of 4 & 5 P. & M. cap. 4. it seems to me to be with this difference.

If the principal be indicted upon the statute of 5 & 6 E. 6. cap. 9. specially, setting forth, that the offender *felonice & burglariter fregit domum J. S. prædicto J. S. uxor, liberis & servantibus suis in eadem domo existentibus*, and stole the goods in the same house, then the accessory to such an indictment shall be arraigned and tried, and if convicted shall be ousted of his clergy by force of the statute of 4 & 5 P. & M. cap. 4.

But if in that case the principal be convict of the burglary, but acquit of the robbery, the accessory shall have his clergy, for the statute of 4 & 5 P. & M. doth not exclude the accessory from clergy, but where there was a robbery.

And again, if the principal be indicted generally of burglary and robbery without forming the indictment either upon 23 H. 8. of putting in fear, or upon the statute of 5 & 6 E. 6. the owner, his wife or children being in the house, tho the principal be convicted and ousted of his clergy by the statute of 18 Eliz. yet the accessory shall have his clergy, altho here were a robbery committed in the dwelling house, and so within the statute of 4 & 5 P. & M. cap. 4. and the reasons are apparent.

[363] 1. Because the principal is not ousted of his clergy in respect of the robbery, for that not being laid according to either of the statutes of 23 H. 8. or 5 & 6 E. 6. if there were no burglary in the case, he should have had his clergy, and he is ousted of his clergy merely upon the account of the burglary by the statute of 18 Eliz. cap. 7. and not of the robbery, because not laid pursuant to either of these statutes of 23 H. 8. & 5 & 6 E. 6. and the statute of 4 & 5 P. & M. ousts the accessory of clergy in relation to the robbery in the dwelling house, and not in relation to the burglary.

2. Because the statute of 4 & 5 P. & M. cannot at all have any respect to the statute of 18 Eliz. which was made twenty years after, and at the time of the statute of the queen neither simple burglary, nor burglary joined with robbery had ousted the principal of clergy, unless the robbery were pursuant to the statutes of 23 H. 8. or 5 & 6 E. 6. which is not laid in the indictment pursuant to either, and therefore the accessory could not be ousted of clergy by 4 & 5 P. & M. in this case, when if the principal himself had been indicted of burglary and robbery generally, he should have had his clergy both as to the burglary and as to the robbery; so that upon a general indictment of the principal of burglary and robbery in the house, the accessory can in no sort be excluded of clergy, unless the principal

be specially indicted of the robbery pursuant to the statute of 23 H. 8. the owner, his wife or children being in the house and put in fear, or according to the statute of 5 & 6 E. 6. *cap.* 9. the owner, his wife or servants being in the house, for tho the principal upon a general indictment of burglary and robbery may be ousted of his clergy by the statute of 18 *Edw.* if found guilty of the burglary, yet he cannot be ousted of his clergy upon the account of the robbery, because not particularly laid according to the old statutes, and consequently the [364] accessory must in that case have his clergy. (b)

But in all cases accessaries *after*, must have their clergy.

CHAPTER L.

CONCERNING CLERGY IN SIMPLE LARCENY AND OTHER FELONIES.

I COME now to consider of some other kinds of felonies, wherein clergy is taken away, and especially in larcenies of several kinds.

1. Stealing of horses. 2. Sacrilege. 3. Taking from the person *clām & secretē*. 4. Servants robbing their masters. 5. Taking clothes off from racks. 6. Stealing king's stores. 7. Taking away women against their wills. 8. I shall consider of piracies and robberies upon the sea. 9. Concerning clergy of prisoners arraigned before the steward and marshal.

1. By the statute of 1 E. 6. *cap.* 12. the felonious stealing of horses, mares or geldings is put from the privilege of clergy.

1. If the person be attainted. 2. Or convict by verdict or confession. 3. Or stands mute. 4. Or will not directly answer. This was in effect enacted before by 37 H. 8. *cap.* 8. but it was necessary to be re-enacted here, because otherwise the general clause in the act of 1 E. 7. *cap.* 12. restoring clergy in all cases where they had it before 1 H. 8. had restored clergy in this case.

There arose a doubt, whether, if there were one horse, mare, or gelding stolen, the offender should [365] have had clergy; and the reason of the doubt was not singly, because the statute of 1 E. 6. was in the plural number, *horses, mares, or geldings*, for then it might as well have been a doubt, whether upon the statute of 23 H. 8. *cap.* 1. he, that

(b) But as to this point the law is now altered, for by 3 & 4 W. & M. *cap.* 9. clergy is taken away from the accessory *before* in all cases of burglary.

had wilfully burned one house, should not have had his clergy, because the words of that statute are in the plural number *dwelling houses or barns*; and so for robbing any *churches or chapels*.

But the reason that made the scruple was, because the statute of 37 *H. 8. cap. 8.* was expressly penned in the singular number, *If any man do steal any horse, mare or filly*: and then this statute of 1 *E. 6.* thus varying the number, and yet expressly repealing all other exclusions of clergy introduced since the beginning of *H. 8.* made some doubt, whether it were not intended to enlarge clergy, where only one horse was stolen.

To remove this doubt was the statute of 2 & 3 *E. 6. cap. 39.* whereby clergy is excluded from him that steals one horse, gelding or mare in all the cases of attainder, conviction, standing mute, or not directly answering.

These statutes exclude the principal from clergy in all these cases, but the accessory *before* or *after* have the privilege of clergy. 1 *Mar. Dy. 99. a.*

But by the statute of 31 *Eliz. cap. 12. in fine statuti* accessories both *before* and *after* in horse stealing are ousted of clergy, as the principal ought to be.

II. As to sacrilege, *viz.* the felonious taking of any goods out of any parish church, or other church or chapel, the principal is ousted of clergy by the statutes of 23 *H. 8. cap. 1.* 25 *H. 8. cap. 3.* and lastly by 1 *E. 6. cap. 12.* in all cases above-mentioned.

And by the statute of 23 *H. 8. cap. 1.* the accessory *before*, if found guilty by verdict or confession, was ousted of clergy, but that is repealed by 1 *E. 6. cap. 12.* as to all accessories.

And the statute of 4 & 5 *P. & M. cap. 4.* extends not [366] to this case, for it takes away clergy from robbery of any dwelling house, but doth not extend to robbing of churches or chapels. (c)

And certainly clergy was not taken away in case of sacrilege at common law, or if it were, yet the statute of 25 *E. 3. pro clero cap. 4.* restored clergy in that case as well as others, and the statutes of 23 *H. 8. & 1 E. 6.* had been needless in this case, if sacrilege were ousted of clergy at common law, and accordingly in the book of 26 *Assiz. 19. (d)* and consequently it is mistaken in *Poulter's case* 11 *Co. Rep. 29. b.*

(c) But if this should be construed a burglary, as it seems to be according to the book of 22 *Assiz. 95.* then clergy would be excluded from the accessories *before*, by the 3 & 4 of *W. & M. cap. 9.*

(d) *Vide accordant* 26 *Assiz. 27. Corone 193. Vide contra* 20 *E. 2. Corone 283.* but according to *Stamf. P. C. fol. 123. b.* it was left to the discretion of the ordinary to claim him or not. *Vide Co. P. C. p. 114.*

III. As to picking of pockets, by the statute of 8 *Eliz. cap. 4.*
 "If any person be indicted or appealed for felonious taking any money, goods, or chattels from the *person* of another *privily without his knowledge* in any place whatsoever, and be found guilty by twelve men, or confess upon his arraignment, or be outlawed, or stands obstinately mute, or will not directly answer, or challenge peremptorily above twenty, he shall be excluded from clergy.

Upon this statute these things are observable.

1. It must be taken from the *person*.
2. It must be taken *privily without his knowledge*, and so laid in the indictment, otherwise he shall have his clergy.
3. The goods must be above the value of 12*d.* for tho in robbery of never so small a value clergy is ousted, because done *violently*, yet here it is otherwise, for if it be not above the value of 12*d.* it is but petit larceny, for the statute did not intend to alter the nature of the crime, but to exclude clergy, where it was grand larceny. *Co. P. C. cap. 16. p. 68.(e)*
4. It doth not oust the accessory either *before* or [367] *after* of the privilege of clergy.

IV. Concerning servants carrying away their masters goods to the value of 40*s.* this was made felony by the statute of 21 *H. 8. cap. 7.(f)* And by the statute of 27 *H. 8. cap. 17.* clergy was taken away.

By the statute of 1 *E. 6. cap. 12.* restoring clergy in all cases, as it was before 1 *H. 8.* except the cases mentioned in that statute, clergy is restored to that offense.

By the statute of 1 *Mar. cap. 1.* repealing all felonies enacted since 1 *H. 8.* the very act itself of 21 *H. 8.* making this felony is repealed.

But by the statute of 5 *Eliz. cap. 10.* the statute of 21 *H. 8.* is again re-enacted to have continuance for ever; but the statute of 27 *H. 8. cap. 17.* taking away clergy in that offense is not

(e) *Vide Part I. cap. 44. p. 529.*

(f) This statute is to be taken strictly with relation to such goods, as are actually delivered to keep by the *master* or *mistress*. *Dy. 5. a. b.* for as to other goods, it was a felony at common law, tho under the value of 40*s.* but where there was a delivery, the servant being in lawful possession, it could not at common law be a felony, *vide Part I. p. 667.* Otherwise therefore it is in the case of a lodger stealing goods or furniture belonging to his lodgings, because he is not intrusted with the possession, but only with the use, and therefore it was felony at common law; *vide Part I. p. 506.* however to obviate all doubt, it is enacted and declared by 3 & 4 *W. & M. cap. 9.* "That if any person or persons shall take away with an intent to steal, imbezle, or purloin any chattel, bedding or furniture, which by contract or agreement he or they are to use, or shall be let to him or them to use in or with such lodging, such taking, imbezelling, or purloining shall be to all intents and purposes taken, reputed and adjudged to be larceny and felony, and the offender shall suffer as in case of felony."

revived and so clergy stands allowable as to that offense at this day.(g)

V. By a statute made the 22 *Car. 2. cap. 5.* clergy is taken away from those that steal clothes off the racks, with power in the judge to transport them to the king's plantations.(h)

VI. By the statute of 22 *Car. 2. cap. 5.* clergy is [368] taken away from those that imbezzle or steal the king's stores.(i)

VII. By the statute of 39 *Eliz. cap. 9.* clergy is taken away from offenses committed against 3 *H. 7. cap. 2.* concerning taking away and marrying or defiling of women in all cases, viz. upon attainder, conviction by verdict or confession, standing mute, challenging above twenty peremptorily, outlawry, not directly answering.

It extends to take away clergy in these cases from all principals and accessaries before the fact in express words, but not from accessaries after.

VIII. As to the statute of 28 *H. 8. cap. 15.* concerning piracy, robbery, murders and manslaughters upon the sea, it is enacted, "That for treason, murder, robbery, felonies and confederacies done upon the sea or in any places whereto that commission extended,(k) the offenders shall not be admitted to have the benefit of clergy or sanctuary, but are excluded from the same.(l)

(g) But since our author wrote is taken away again by 12 *Ann. cap. 7.* from all persons, (except apprentices under the age of fifteen years, who shall rob their masters,) if the offense be committed in a dwelling house or outhouse.

(h) By 4 *Geo. 2. cap. 16.* the stealing linen, fustian, &c. from any whitening grounds to the value of 10s. or buying or receiving the same, knowing it to be stolen is excluded from clergy with power to the court upon the circumstances of the case to transport the offender for seven years.

(i) Viz. in such manner as is forbid by 31 *Eliz. cap. 4.* whereby it was made felony: vide *Part I. p. 688.*

(k) It was a doubt upon this statute, whether an accessory at land to a felony or piracy at sea was included within the extent of the commission directed by this act, *Yelo. 134, 135.* but by 11 & 12 *W. 3. cap. 7.* (continued by 5 *Ann. cap. 34. 1 Geo. 1. cap. 25.* and made perpetual by 6 *Geo. 1. cap. 19.*) it is provided, "That accessaries to piracy before or after shall be tried and adjudged according to 28 *H. 8.* and shall suffer the same penalties and in like manner as the principals."

If a mortal stroke be given on the high sea, or on the shore at full sea, and the party die upon the shore at low water, this is not within this statute, nor shall the admiral have jurisdiction to try the offense, nor yet can it be tried at common law by a general commission of *oyer and terminer*: vide *supra, p. 20 & Part I. p. 426.* To remedy this inconvenience it is provided by 2 *Geo. 2. cap. 21.* "That where any person shall be feloniously stricken or poisoned upon the sea or any place out of *England*, and shall die thereof in *England*; or shall be feloniously stricken or poisoned at any place in *England*, and shall die thereof upon the sea or any place out of *England*, an indictment may be found in such county, where such death, stroke, or poisoning shall happen, against both principals and accessaries, and may be proceeded upon in the same manner as if such felonious stroke and death, or poisoning and death had happened in the same county, where such indictment shall be found."

(l) It was doubted, whether this statute of 28 *H. 8.* had not taken away the

Upon consideration of the statute of 1 E. 6. cap. 12. which in all cases not mentioned in that statute restores the privilege of clergy, as it was before 1 H. 8. it is said in *Poultter's case*, 11 Co. Rep. 31. b. that thereby clergy is restored in case of piracy.

But upon consideration of both these statutes I think as followeth, viz.

1. *First*, That by the statute of 1 E. 6. cap. 12. in all other felonies (not particularly excepted by the statute of 1 E. 6. cap. 12.) that the common law takes notice of, clergy is restored by the statute of 1 E. 6. cap. 12. notwithstanding this statute of 28 H. cap. 15. even for felonies within that jurisdiction or commission of the admiralty settled by that statute.

And therefore, if a man be slain below the bridges upon the river *Thames*, but not *ex malitid*, or if a larciny be committed there, that is within clergy, if committed upon the land, the party shall be admitted to his clergy by force of the statute of 1 E. 6. cap. 12.

2. *Secondly*, if such a felony were committed upon the high sea, that were not excepted by the statute of 1 E. 6. cap. 12. but should have had clergy by that statute were it upon the land, in such case, tho the proceeding be by the statute of 28 H. 8. the party shall have his clergy, for the statute of 1 E. 6. is general, in all other cases of felony clergy shall be allowed as it was before 1 H. 8. and the exemp-

trial of these offenses before the admiral, or his lieutenant or commissary, which had occasioned a total disuser of such manner of trial to the encouragement of pirates, who could not be tried by this statute, unless (at great trouble and expence,) brought to *England*, and therefore the aforesaid statute of 11 & 12 W. 3. cap. 7. provides, that they may be tried by the court of admiralty according to the directions of that act, which are there particularly mentioned.

By the same statute it is enacted, "That if any of the king's natural born subjects shall commit any piracy, robbery, or act of hostility against others the king's subjects, altho it be under colour of a commission from any foreign prince; or being a commander or master of a ship, or seaman shall feloniously run away with his ship, &c. or voluntarily yield up the same to any pirate, or bring any seducing message from any pirate, enemy, or rebel, or endeavour to corrupt any commander, &c. to yield up or run away with any ship, &c. or turn pirate, or go over to pirates, or if any person shall lay violent hands on his commander to hinder him from fighting in defense of his ship or goods, or shall confine his master, or endeavour to make a revolt in his ship, every such person shall be adjudged a pirate, felon and robber."

By 8 Geo. 1. cap. 24. "All persons, who by 11 & 12 W. 3. cap. 7. are declared accessories to any piracy there mentioned, are declared to be principal pirates.

By the same statute it is provided, "That if any one shall trade with or furnish any pirate, &c. with provisions, &c. or shall fit out any ship or vessel, with such design, or shall consult or correspond with any pirate, &c. knowing him to be such, or shall forceably board and enter any merchant ship on the high seas, or in any port, haven or creek, and shall throw over-board or destroy any part of the goods or merchandizes belonging to such ship, such offender shall be adjudged guilty of piracy, and shall be tried according to the statutes of 28 H. 8. & 11 & 12 W. 3. and being convicted shall suffer as a pirate without benefit of clergy."

tion of clergy^(*) was before that statute of 28 *H. 8.* extendible to the admiral's jurisdiction, as well as to courts of common law.

3. *Thirdly*, But as to piracy or robbery upon the sea by pirates and rovers I think clergy remains still taken away by the statute of 28 *H. 8.* and is not restored by 1 *E. 6. cap. 12. (m)* and the reasons are,

1. Because I take it before 1 *H. 8.* there was no clergy allowable for it at common law, for it was an act of hostility, and consequently is not touched by the statute of 1 *E. 6. cap. 12.*

2. Admitting that clergy were allowable in piracy before 1 *H. 8.* and taken away merely by the statute of 28 *H. 8. cap. 15* yet clergy is not restored by 1 *E. 6.* therein, because it restores it only *in all other cases of felony*, which is intended only of felony, whereof the common law takes notice, but piracy is of another nature, and the common law takes not notice of it under the name of *felony*, and therefore a pardon of all *felonies* pardons not *piracy*: *vide Co. P. C. cap. 49. p. 112, 113.* and accordingly the use hath obtained in the proceedings of the commissions founded upon 28 *H. 8.*

IX. As to the statute of 33 *H. 8. cap. 12.* touching felonies in the king's household and proceedings thereupon before the lord steward there is a clause, that in case of manslaughter in the king's house tried before the lord steward, and also in all other felonies committed within the king's house, the offenders, the abettors, procurers, and receivers being convict shall suffer pains of death, as appertaineth to felons, without benefit of clergy.

In my opinion the statute of 1 *E. 6. cap. 12.* hath [371] repeald so much of this statute, as excludes from clergy such offenses as are not exempt from clergy by 1 *E. 6.* for these are felonies, that the law takes notice of, and such wherein clergy was allowable before 1 *H. 8.* and consequently the general words of that act restore clergy in these cases, tho the proceeding thereupon be before the lord steward by this act of 33 *H. 8. cap. 12.* for the words of 1 *E. 6. cap. 12.* are general *in all other felonies*, and they are *in materia fa-*

(*) *Viz.* the allowance of clergy; for our author here means by exemption of clergy the privilege of being exempted on account of clergy from punishment in the king's temporal courts.

(m) As to those who shall commit any offense, for which they ought to be adjudged pirates, felons, and robbers by 11 & 12 *W. 3. cap. 7.* clergy is expressly taken away from such by 4 *Geo. I. cap. 11.* and as no mention is made of such as were deemed pirates before that statute, it is an argument, that the law was taken to be, that they were ousted of clergy before.

vorabili, in case of life, and in case of a privilege, which hath been ever favoured in law, and therefore shall be generally construed and not restrained by construction or interpretation.

CHAPTER LI.

WHAT PERSONS ARE OR ARE NOT CAPABLE OF CLERGY.

I HAVE gone through the consideration of the *crimes* or offenses, wherein clergy is, or is not allowable; I now come to consider the *persons* that are, or are not capable thereof, admitting the crimes themselves within clergy.

Touching persons to be admitted to clergy, succession of times hath made great change in the law. Antiently *Nuns* professed were admitted to the privilege of clergy, tho they could not be priests, yet they are within the *privilegium* or *immunitas ecclesiæ*, and had their clergy, 22 *E. 3. Coron.* 461. but other women had not by the common law the privilege of clergy.

But at this day profession is abolished, and no woman admitted to the privilege of clergy at this day; only by the statute of 21 *Jac. cap. 6.* if a woman be lawfully [372] convict by verdict or confession of stealing goods under the value of 10*s.* and above the value of 12*d.* being such an offense, wherein a man might have his clergy, she shall for the first offense be burnt in the hand, and to be farther punished with whipping, sending to the house of correction, imprisonment, &c. as the judge shall in discretion think fit, this act hath continuance to this day by the statutes of 3 *Car. 1. cap. 4.* 16 *Car. 1. cap. 4.(a)*

Again by the statute of bigamy *cap. 5.(b)* *Bigamus* was ousted of clergy, 40 *Assiz. 17.* but by the statute of 1 *E. 6. cap. 12.* he is restored to the benefit of clergy, if the offense be within clergy, and tho *Stamf. Lib. II. cap. 46. fol. 134. b.* doubts whether that point of the statute be not repealed by the statute of 1 & 2 *P. & M. cap. 8.* whereby all statutes against

(a) But now upon the statute of 3 & 4 of *W. & M. cap. 9.* a woman convicted or outlawd for any felony, for which a man might have his clergy, shall upon praying the benefit of that statute be subject only to such punishment, as a man would be in the like case, *viz.* be burnt in the hand and detained in prison at the discretion of the judge, not exceeding one year.

(b) 2 *Co. Instit. p. 273.*

the authority of the Pope or See of *Rome* are repeald, yet the law hath been sufficiently settled in this point, that *bigamus* hath his clergy at this day *T. 3 Eliz. Dy. 201. b. Lamb's case*, for by the statute of *1 Eliz. cap. 1.* all the clauses in the statute of *1 & 2 P. & M. cap. 8.* not specially excepted are repeald, and this is none of the excepted clauses, and so the statute of *1 E. 6. cap. 12.* stands renewed by *1 Eliz. cap. 1.* if at all impeached or repeald by *1 & 2 P. & M.*

Again, at common law, if the clerk convict deliverd to the ordinary had broke the bishop's prison and been after taken, he had lost the benefit of his clergy, *22 E. 3. Coron. 257.* but at this day that can never come in question, for by the statute of *18 Eliz. cap. 7.* clerks convict are not now to be deliverd to the ordinary, but burnt in the hand and so discharged.

Again, antiently the law was held, that if the prisoner had not *habitus & tonsuram clericalem*, he should not have the benefit of clergy, *26 Assiz. 19. 20 E. 2. Coron. 233.*

[373] or the ordinary might have refused him, tho he could read; but in process of time that law was altered and the court would admit him to his clergy, if the case were within clergy, tho he had not *habitus & tonsuram*, if he could read, and tho the ordinary refused him upon that account. *9 E. 4. 28. b. 34 H. 6. 49. a. b.*

A man attaint(*) of heresy, a *Jew*, or a *Turk* shall not have their clergy, but a person excommunicate shall have his clergy. *11 Co. Rep. 29. b. Poulter's case.*

A *Greek* or alien, who knows not our letters, shall have his clergy, and shall read in the book of his own country. *B. Clergy 20.*

A bastard, a man blind shall have his clergy,(c) if he can speak *Latin* congruously. *B. Clergy 21, 22.*

By the statute of *4 H. 7. cap. 13.* "A man not within holy orders, that hath once had his clergy, shall be burnt in the hand with M or T, and being after arraigned for any such offense, (*viz.* an offense within clergy,) he shall not be admitted to his clergy a second time." "And if any man upon a second arraignment for such offense claim his clergy, as being a clerk in orders, if he have not his letters of orders, or certificate of the ordinary witnessing the same, the justices shall by their discretion give him a day to bring them, at which day if he fail, he shall lose his clergy that second time."

(*) This should be *convict*, and so it is exprest in the authority here cited, *viz.* *11 Co. 29. b.* for heresy wrought no attainder, altho by *2 H. 5. cap. 7.* see simple lands were forfeited upon conviction.

(c) This is denied of a blind man, *11 Co. Rep. 29. b. & Broke* in the place cited above makes a *quere* of it, because he can by no dispensation be a clerk in orders, aliter of a bastard, for he may be a priest by license.

Note no man shall be ousted of his clergy a second time by the bare mark in his hand, or by a parol averment without the record testifying it,(†) and it seems, that if he deny he is the same person, issue must be joined upon it and tried to be the same person, before he can be ousted of clergy.

The orders, that come under the name of holy orders, were four, *viz. a bishop, a priest, a deacon, and a subdeacon*; other inferior orders, as *exorcistæ, lectores, acoluthi, &c.* were not called holy orders, but were called *clerici in minoribus*. [374]

By this and some other instances, which appear in the statutes, it is evident, that the clergy in orders had a greater privilege allowed them than others.

1. A clergyman in orders in such cases, wherein clergy is ousted by the statute of 1 *E. 6. cap. 12.* as murder, robbery, &c. hath no more privilege than a layman, because the statute makes no exception or provision for him.

2. If a statute be made after 1 *E. 6.* ousting clergy generally, as the statute of 4 & 5 *P. & M. cap. 4.* 18 *Eliz. cap. 7.* a clergyman in orders hath no more privilege than another, for the statute provides not for him. *Stamf. P. C. 135. b.*

3. And therefore, tho the statute of 23 *H. 8. cap. 1.* and 25 *H. 8. cap. 3.* excluding clergy from those found guilty in petit treason, murder, robbery, &c. excepts such as are in the order of subdeacon, or any superior orders, and directs them to be delivered to the ordinary to remain in prison without purgation, or to be degraded, and then sent by the ordinary into the king's bench to be executed, it seems, that this privilege is at this day gone. 1. Because by the statute of 18 *Eliz. cap. 7.* all delivery of clerks convict to the ordinary is wholly taken away. 2. Because in all those cases, where clergy is ousted by the statute of 23 *H. 8.* clergy is ousted by the statute of 1 *E. 6. cap. 12.* (except burning of houses, and accessaries before the fact, which stand within clergy by the statute of 1 *E. 6. cap. 12.*) and in that statute there is no saving of any privilege for clerks in orders, as there is by 23 *H. 8.*

And then as to accessaries before the fact clergy is likewise generally taken away by the statute of 4 & 5 *P. & M. cap. 4.* without saving of more privilege to clergymen than to laymen.

4. But as to the privilege of a second allowance of clergy, it should seem at this day, clergymen in orders shall have benefit of clergy, a second, third time, or oftener.

The statute of 28 *H. 8. cap. 1.* puts clergymen in orders under the same pains and dangers in relation to [375]

(†) Or a transcript thereof, for the manner of certifying which see 34 & 35 *H. 8. cap. 14.* and 3 & 4 *W. & M. cap. 9.*

the statute of 23 *H. 8. cap. 1.* 25 *H. 8. cap. 3.* as other persons not in orders; this takes away the privilege given by 23 *H. 8.* and 25 *H. 8.*

Then by the statute of 32 *H. 8. cap. 3.* which makes the former perpetual, it is farther enacted, "That such persons as be within holy orders, which by the laws of this realm ought or may have their clergy for any felonies, and shall be admitted to the same, shall be burnt in the hand as lay clerks be accustomed in such cases, and shall suffer and incur afterwards all such pains, dangers, and forfeitures, and be ordered and used for their offenses of felony to all intents, purposes and constructions, as lay persons admitted to their clergy be, or ought to be ordered or used by the laws and statutes of this realm, any law or statute to the contrary notwithstanding."

This act was perpetual and subjected clerks in orders, notwithstanding the statute of 4 *H. 7. cap. 13.* to two inconveniences, *viz.* 1. To burning in the hand. 2. Exclusion of clergy a second time.

But then the statute of 1 *E. 6. cap. 12.* restores the privilege of clergy in all cases, (except those offenses contained in the statute of 1 *E. 6.* and expressly excluded from clergy,) as it was before 1 *H. 8.*

And altho by this statute of 1 *E. 6.* the burning of a clergyman in orders in the hand is not taken away by express words, yet he is restored to his clergy a second or other time, notwithstanding he had formerly his clergy and was burnt in the hand.

But altho in express words it restores not to clergymen in orders the exemption from burning in the hand given by 4 *H. 7. cap. 13.* yet it doth in equivalence, for it restores clergy in all other cases *in like manner and form, as it was before 1 H. 8.* which as to clergymen in orders was without burning in the hand, and accordingly to this day their privilege in that kind continues: *vide 2 Co. Inst. 637. Hob. Rep. 294. Searle & Williams.*

And tis a mistake to say, that if he challenge above [376] twenty, he shall lose his clergy a second time, because the statute of 1 *E. 6.* in letting loose the clergy in other offenses mentions not that case, for in case of challenging above twenty, there follows neither penance nor judgment of death, but only his challenge is overruled. (*)

But indeed the case of outlawry is *casus omissus*, for tho in the clause excluding clergy the word *attainder* is in, which extends to an outlawry, yet in the second clause restoring clergy as it was before 1 *H. 8.* in other cases *attainder* and *outlawry* are omitted.

(*) *Vide supra p. 270, 345.*

As to clergy of noblemen.

By the statute of 1 E. 6. *cap.* 12. "Peers of parliament committing felonies within clergy may pray the benefit of this act, and shall not be put to read, nor be burnt in the hand for the first offense, without any attainder or corruption of blood to be incurred thereby, and for the first offense shall be deemed, taken and used as clerks convict, which make purgation, without any further privilege of clergy from henceforth at any time after for any cause to be allowed or admitted."

This privilege of peers to be discharged in this manner by this statute, 1. Must be prayed by them. 2. Extends to all cases, where a common person may have his clergy. 3. To all cases excepted from clergy by that statute, except murder and poisoning of malice prepense.

But it extends not 1. To felony put out of clergy by any subsequent statute. 2. Nor to felonies within this statute, where he cannot make purgation, as if he abjure, confess the felony, or be outlawd, by the opinion of *Stamf. P. C. fol.* 130. *a.* but this latter seems doubtful, especially at this day, when delivery to the ordinary and purgation are both taken away by 18 *Eliz. cap.* 7.

I think it was never meant, that a peer of the realm should be put to read or be burnt in the hand, where a common person should be put to his clergy, neither is it said, that he shall be discharged by his praying the benefit of this statute, where a common person shall have the privilege of [377] clergy and may make his purgation, but only where he may have the benefit of his clergy in the first clause of the statute, the other clause, (*shall be in case of a clerk convict, that may make purgation,*) is only for his speedier discharge and farther advantage, and not to restrain the general clause.

And therefore a great lawyer in the late times hath been much blamed for burning a peer of parliament in the hand, that confessed an indictment of manslaughter; and it was the only error of note, that the person erred in to my observation.

CHAPTER LII.

AT WHAT TIME CLERGY IS TO BE ALLOWD.

ANTIENLY the law was very unsettled in this point, till settled by subsequent acts of parliament and resolutions of the judges.

Before the statute of *Westm. 1. cap. 2.* the ordinary would challenge clerks as soon as they were indicted, nay sometimes, as soon as they were imprisond, (*) before they were indicted, as appears by the statute of *Marlbr. cap. 28. (a)*

By the statute of *Westm. 1. cap. 2.* it is provided, *Que quant clerke est prise pur rette de felonie & soit demand per l'ordinaire, il lui soit liuer solonque le privilege de Saint Eglise en tiel peril come il appent solonque le custome avant ces heures use*, and a direction given thereby to the ordinary, *Que ceux que sont endites de tiel rette per solemne inquests des probes hommes fait in le court le roy, en nul manner* [378] *les deliverent sans due purgation, issint que roy n'eit mestier de mettre autre remedy. (b)*

- After this statute the prisoner was not only to be indicted before clergy allowd, but many times inquisitions *ex officio* were taken. (t) 1. Whether he were a clerk or no, and if not a clerk, he was not delivered to the ordinary. 2. Whether he were guilty or not, and if not guilty, he was discharged. 3. If found guilty, he was then delivered to the ordinary. *Vide 2 Co. Inst. 164. 8 E. 2. Coron. 417. 17 E. 2. Coron. 386. 3 H. 7. 12. b.* but his goods were seised.

But this was found a great inconvenience to the prisoner, because in case of an inquest of office he lost his challenges, and besides possibly he might be quit of the felony, were he put upon the jury.

And therefore in the time of *H. 6.* the court was changed by *Prisol*, and the prisoner hath been always since put to plead to the indictment, and if convict, then to pray his clergy: *vide 3 H. 7. 12. b. Stamf. P. Co. fol. 131. a. 11 Co. Rep. Poulter's case.*

But if the prisoner will wave that advantage and will pray his clergy, he may, for no law ousts him of it, but then, if the

(*) *Vide Bract. Lib. III. f. 123. b.*

(a) *2 Co. Inst. 150.*

(b) *2 Co. Inst. 163.*

(t) *Vide Part I. p. 180. in notis. p. 343. in notis, & supra p. 318. in notis.*

indictment be out of clergy, he must answer to the felony, or he shall have his penance.

But at this day clergy is never granted, unless the party confess the felony, or be convict by verdict.

If a man be indicted of a felony within clergy, and he plead and be convict, and it be demanded of him, what he can say why judgment should not be given against him, he may pray his clergy, tho there be no ordinary to demand him, for as shall be said in this case, the ordinary is but the minister of the court, and it is not now, as antiently, used for the ordinary to demand a prisoner, but he may pray his clergy himself.

If in that case the ordinary demand not the prisoner, nor the prisoner himself prays his clergy, yet if it appear to the court, that he is a clerk, or be so named in the indictment or appeal, the court may, and it seems ought *ex officio* to [379] allow him his clergy, but howsoever they thought not to execute him. 22 E. 3. *Coron.* 254. *Abbridg. Assiz.* 74.(c)

If by any mistake or oversight the court should give judgment against him, yet they may, (and as I think,) ought to allow him his clergy after his attainder.

And therefore the prisoner condemned shall in such a case be allowed his clergy under the gallows, if the judge come that way, 34 H. 6. 49. *a. b.* This is agreed may be done by the judges of the king's bench, as justices of peace, because their commission continues, but it is doubted, how it can be done by justices of *oyer* and *terminer* after their session ended. *Crompt. Just.* 119. *a.*

And it is true, that tho they may allow clergy during the adjournment of their commission, yet they cannot do it after their session is over, but they may reprieve him after judgment, notwithstanding their session determined, upon consideration that he can read, and then may allow him his clergy as a clerk attain at the next session. 3 & 4 *Eliz. Dy. a.*

A. is indicted of a felony within clergy, and hath his book delivered him but cannot read, and the ordinary returns accordingly *non legit*, and it is entered of record *non legit*, and the court reprieves him till another sessions, and^o by that time he hath learned to read, tho the gaoler, that taught him to read in the mean time, was antiently punishable, yet he shall be admitted to his clergy and be delivered. 27 *Assiz.* 44. *n. 11. Dy.* 205. *a. b. per omnes justiciarios, Dy.* 214. *b. Stone's case.*

And the same law it is, if judgment of death were entered against him upon *non legit* returned; yet if he can read after,

he shall be delivered to the ordinary and have his clergy *per omnes justiciarios*. 34 H. 6. 49. *Coron.* 20. (*)

If a man abjure the kingdom, (which is an attainder in law,) and come back again, he shall have the privilege of his clergy, as a clerk attaind. 8 H. 6. *Kelw.* 186. *b. Rast. Entr. fol.* 1. *b.*

But in antient time he was not delivered to the [380] ordinary, but remanded to prison till he obtained the king's pardon for returning into the kingdom without licence, and that being obtained he should be delivered to the ordinary, 1 E. 3. 16. *b. Coron.* 155. *Stamf. P. C. Lib.* II. *cap.* 50. but this law is antiquated: *vide Rast. Ent. fol.* 1. *b. ex T.* 15 H. 7. *rot.* 2.

If a man indicted of a felony within clergy stands mute, yet he shall have his clergy. *Moore's Rep.* n. 738. *p.* 550. *Winter's* case, yea tho judgment of *peine forte & dure* were given against him, if the case, as it appears upon the indictment, be within clergy, for the court in this case ought to be of counsel with the prisoner *in favorem vitæ*, tho he be wilful.

If the approver disavow his appeal, or be vanquished in battle, or become recreant therein, yet he shall have the privilege of clergy, if the cause, for which he is indicted, be within clergy.

But in these cases of attainder antiently they were delivered to the ordinary *absque purgatione*. 15 H. 7. *Rast. Ent.* 1. *b.*

CHAPTER LIII.

CONCERNING THE MANNER HOW, AND THE JUDGE BY AND BEFORE WHOM CLERGY IS TO BE PRAYED OR ALLOWD.

ANTIENLY the ordinary took upon him, as the person that was to judge of the competency or incompetency of the clerk. But in truth the king's justices were the judges both touching the competency of the clerk to be admitted, and the sufficiency or insufficiency of his performance therein, and the [381] ordinary was in truth but the minister to the court. 5 Co. *Rep.* 26. *b. case of ecclesiastical law.* (a)

If the ordinary had challenged one as a clerk, that the court

(*) These points cannot now come in question, for the necessity of reading is entirely taken away by 5 Ann. *cap.* 6.

(a) *Vide Kel.* 28. 51.

judged not to be such, the ordinary or bishop should be fined, and his temporalties seised, 7 H. 4. 41. b. *Stamf. P. C.* 132, 133, and the felon shall be hanged. 7 E. 4. 29. a. 9 E. 4. 28. a.

Again, if the ordinary refuse one that can read, and return *non legit*, yet the court may hear him, and if they judge him to read sufficiently, the prisoner shall be saved notwithstanding the refusal and return of the ordinary, and accordingly, if the ordinary be absent, the court may give him his book. 7 E. 4. 29. a. 9 E. 4. 28. a. 7 H. 4. 41. b. 34 H. 6. 49. a. b. *Stamf. P. C. Lib. II. cap. 45. fol. 132, 133.*

And therefore the judge may and usually doth appoint the verse, that the clerk shall read, *Stamf. P. C. ubi supra*, and therefore the practice of *Bryan* and *Starkey*; 21 E. 4. 21. is justly reprobable, who when they delivered a book to the prisoner and he read well in the presence of the justices, yet when the ordinary returned *non legit*, gave judgment of death against the prisoner, for in truth the ordinary is but the minister, or at most the assistant to the court, and not the judge. *Hob. Rep. p. 290. Searle & Williams. (b)*

CHAPTER LIV.

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CONCERNING THE CONSEQUENCES OF CLERGY GRANTED OR PRAYED.

THE consequences or effects upon clergy granted are considerable in two ways, 1. What they were before the statute of 18 Eliz. and 2. What since.

Touching the consequences of clergy before the statute of 18 Eliz. they were these.

I. Regularly when clergy was granted, there was an entry made by the court of king's bench, *Et tradito ei hic per curiam libro legit ut clericus*, & J. S. (the ordinary or his deputy,) *petit ipsum, ut clericum, præfato ordinario deliberari, ideo consideratum est, quod prædictus A. B. liberetur præfato ordinario.* And if it be without purgation, then there is this added, *salvo custodiend' absque aliqâ purgatione inde de*

(b) But this learning is now out of use, for by 5 Ann. cap. 6. every person convicted of a felony within the benefit of clergy shall, upon praying the benefit of that statute, without any reading, be allowed to be, and be punished as a clerk convict, and this shall be as effectual and advantageous to him, as if he had read as a clerk.

cetero faciendū sub periculo, quod incumbit. 17 H. 7. Rot. 2. *Rast Entries* 121. a. But if it be not without purgation, then that clause is omitted.

This is the form of the award in the king's bench, but before justices of gaol-delivery the entry commonly is, *Et traditur ordinario*, either generally or *absque purgatione*, as the cause requires. M. 2 & 3 Eliz. Dy. 205. b. & *ibid.* 215. a.

II. When he was so delivered to the ordinary, he was to remain in the ordinary's prison; viz. if committed generally, then he was to remain till he had made his purgation, if *absque purgatione*, then he was to remain there during his life, unless the king pardon him.

And if the clerk had broke prison, this was not a felony within the statute of 1 E. 2. *de frangentibus prisonam*;(*) but if the clerk were attaint and delivered to the ordinary and broke prison and escaped, and were after taken, he should [383] have been executed upon his first attainder, *quod vide* 27 Assiz. 42.

But by the statute of 23 H. 8. cap. 11. if such a clerk break the prison of the ordinary and escape, this is made felony without clergy; only the clerk, if in orders, being convict was to be delivered to the ordinary without purgation, and he might, if he pleased, degrade him and send him into the king's bench with letters signifying his degrading, and that court, have the record of the conviction before them, might give judgment and award execution, as if he had been a layman and found guilty before them.

But this among the rest of the felonies enacted in the time of H. 8. was repealed by 1 E. 6. cap. 12. & 1 Mar. cap. 1.

III. If the clerk were committed generally, he might make his purgation,**) the form whereof is unnecessary to recite, being it is now taken away by 18 Eliz. and is fully described and directed by *Stamford Lib.* II. cap. 48. fol. 138. and the statutes of *Westm.* 1. cap. 2. 4 H. 4. cap. 3.

And if the ordinary would not admit a clerk to his purgation, a writ might issue out of the chancery to command it, where by law it might be done. 15 H. 7. 9. a. *per Fineux.*

And when he had made his purgation, he had always restitution of his *lands* seised, unless he were attaint. 8 E. 2. *Forfeiture* 34.

But as touching *goods* the difference was thus:

If before conviction upon his arraignment the prisoner had

(*) Because that statute was construed to extend only to the king's prison: *vide Part I. p. 608.*

(**) This was a trial before the ordinary by a jury of twelve clerks, wherein if he was acquit, he was discharged; if found guilty, he was degraded.

his clergy, (as was used commonly before the time of H. 8.) then if he made his purgation, upon signification thereof to the chancery he had a writ to the sheriff to restore him his goods, *nisi ed de causâ fugam fecerit*, for then he had no restitution, *F. N. B.* 66. a. but if he died before purgation, his executors could not have it.

But if he had pleaded to inquest, and were convict, then the goods were forfeited by the conviction, and he should not have restitution of his goods upon his purgation, [384] and altho the law was taken antiently, that even in case of a conviction, unless there were an attainder also by judgment, he should upon his purgation have had restitution. 3 E. 3. *Coron.* 365. 40 E. 3. 42 a. yet of latter times the law hath constantly obtained otherwise, as appeareth 8 H. 4. 2. a. 20 E. 4. 5. B. *Coron.* 166. *Plow. Com.* 262. b. *Stamf. P. C. Lib.* III. cap. 23. vide 3 E. 3. *Coron.* 332.

And the same law seems to be, if he come not in upon the exigent awarded, if he fled, if he stood mute, or challenged above thirty-five, for in all these cases he forfeited his goods, and should not have restitution upon his purgation, vide 8 E. 2. *Coron.* 417. where, tho he prayed his clergy before conviction, yet upon an inquest of office finding him guilty he forfeited his goods; the like H. 17. E. 2. B. R. rot. 87. *Heref.* in the bishop of *Hereford's* case before cited cap. 44. p. 326.

But if the clerk were delivered to the ordinary *absque purgatione*, there he continued prisoner during his life, unless pardoned by the king, and the king had not only his goods, as absolutely forfeited, but also the profits of his lands during his life, as appears by the books above cited.

And if the clerk were so delivered *absque purgatione*, if the ordinary went about to admit him to purgation, a writ might issue out of the chancery to prohibit him, *Claus.* 22 H. 3. m. 17. verso, *Episcopo Exon.* H. 14. E. 3. B. R. rot. 19. *Lond.* and he shall for it be fined, and his temporalities seised for the contempt, and by some books it is an escape in the ordinary. 9 E. 4. 28. a.

There were certain cases, wherein the clerk was delivered to the ordinary *absque purgatione*. 1. Where he was outlawed of felony 23 H. 8. cap. 1. *Rast. Entries* 121. a. 2. Where he confessed the felony either upon his arraignment, or become an approver, or confessed and abjured and after came into the realm again, for against his own confession he should not be admitted to purge himself of the crime he confessed. 3 H. 7. 12 a. 3. If he had judgment given against him, whereby he was attaint. 10 E. 3. *Coron.* 247. 4. If he were in orders and broke the prison of the ordinary and made [385]

his escape, by the statute of 23 H. 8. cap. 11. 5. Where a man in orders was convict of any of the felonies ousted of clergy by 23 H. 8. cap. 1. he was to remain during his life without purgation, and the ordinary might degrade him and send him into the king's bench to receive judgment. 6. If he were only convict by verdict in an appeal, he should not make his purgation. 12 R. 2. Coron. 109. 10 E. 2. Coron. 247.

IV. If a felon had his clergy, regularly he was never to be arraigned again before the king's justices for the same felony, unless it were in case where he broke the prison of the ordinary and escaped. 20 E. 2. Coron. 232.(a)

V. If a clerk had his clergy for felony, he was not to be arraigned for any other felony by him committed before his clergy allowed, for by the statute of 25 E. 3. cap. 5. *pro clero*, it is enacted, "That he shall be arraigned of all his felonies at once," (b) yea and altho he only prayed his clergy, tho there be no entry of record, that he read or was delivered to the ordinary, yet by force of this statute he shall not be arraigned of any felony committed before, for the first felony being within clergy, and he praying his clergy, it was the fault of the court, that he had it not, which shall not turn to his disadvantage. T. 4 Eliz. Dy. 214. b. *Stone's case*.

Yet this hath some exceptions, for if he had committed treason against the king before his clergy admitted, he may after his clergy and after his purgation also be indicted and arraigned for that treason, because it was an offense not within benefit of clergy.

VI. If he had committed a felony after he had his clergy, and was delivered to the ordinary, he should be put to answer that felony, *vide* 4 Eliz. Dy. 214. b. and if he had killed his keeper and thereby escaped of the ordinary's prison, he should [386] not for that felony have had his clergy for it, *frustra legis auxilium quærit, qui in legem committit*. 8 E. 2. Coron. 419. 22 E. 3. Coron. 250.

The case of *Stone*, 4 Eliz. Dy. 214. b. was this.

Stone committed two felonies the same day, one (suppose it burglary) out of clergy, the other (suppose it larceny) within clergy, he is indicted of the larceny, he pleaded and was convict, and prayed his clergy, and entered *non legit ut clericus*, and no judgment, *quod tradatur ordinario*, but is reprieved without judgment to another sessions, at which he is indicted

(a) For in that case *ecclesia ipsum tueri non debet*, *vide* Bracton, Lib. III. de coronâ, f. 131. a.

(b) This statute was only in affirmance of the common law, for he was to be degraded by the ordinary, and this was thought a sufficient punishment for all offenses committed before degradation; *vide* Bracton, Lib. III. de coronâ, cap. 9. f. 123. b.

of the other felony out of clergy, but supposed to be the same day when the former felony was committed, he is arraigned and pleads *non culp*, and is found guilty, & *petit librum & legit ut clericus, sed non crematur, neque traditur ordinario*.

1. It was agreed, that this second reading, notwithstanding the *non legit* first entered, is a good discharge of the first felony within clergy *per omnes justiciarios*, *Dy. 205. a. b.* but then,
2. The question was, what should be done as to the second not within clergy, whereof he was indicted and convicted: by seven justices he shall have judgment to die, because it shall be intended a felony committed after the first arraignment, but by other seven he shall be discharged, for it shall be intended a felony committed the same day, as it is laid, and tho there be no award, *quodd tradatur ordinario*, yet that was the act of the court and shall not prejudice him; but he shall be adjudged in the custody of the ordinary from the first prayer of his clergy.

But afterwards 28 *Maii* 8 *Eliz.* he was indicted for murder committed the first of *April* 1 *Eliz.* and was convict and had judgment, and was executed, and yet that murder was before his clergy prayed, and before the statute of 2 *Eliz. cap. 4.* therefore it seems the former opinion obtained, for if he had been discharged by his reading as to the felony, whereof he was first indicted, he must have been discharged of all felonies committed before his first arraignment. The only salve that I can think of is either, 1. That he should have *pleaded* it and did not; or 2. That the *legit ut clericus* must be intended [387] to be applied to the second felony only, and not to the first, whereupon *non legit* was entered. *Dy. 215. a.*

And thus far touching the effect of clergy, as it stood before 8 & 18 *Eliz.*

By these two statutes two great alterations were made in the whole business of clergy which took away many of those intricate questions, tedious proceedings, and great inconveniences, that were therein before this time.

1. By the statute of 3 *Eliz. cap. 4.* it is enacted, "That every person, which shall hereafter upon his arraignment for any felony be admitted to the benefit of clergy by the laws of this realm, and delivered to the ordinary for the same, and shall make his due purgation for the same offense or offenses, whereupon he was so admitted to his clergy, and shall before his admission to his clergy have committed any other such offense, whereupon clergy by the laws or statutes of this realm is not allowable, and not being thereof before indicted and acquitted, convicted, or attainted, or pardoned shall and may be indicted or appealed for the same, and thereupon put to answer, and ordered and used in all things according to the laws and statutes

of this realm in such manner and form, as tho no such admission to clergy had been."

By this statute, tho all other felonies within clergy before clergy admitted stand discharged, as they were at common law, yet felonies out of clergy committed before clergy allowed may still be prosecuted, notwithstanding clergy allowed, and so as to so much it repealed the statute of 25 E. 3. *pro clero*, cap. 5.

Then at the parliament of 18 Eliz. cap. 7. it is enacted, "That every person, which at any time hereafter shall be admitted and allowed to have the privilege of clergy, shall not thereupon be delivered to the ordinary, as hath been accustomed, but after such clergy allowed, and burning in the hand according to the statute in that behalf provided, shall forthwith be enlarged and delivered out of prison by the justices, before whom such clergy shall be granted, that cause notwithstanding, provided, [368] that the justices may for farther punishment detain the clerk in prison for any time not exceeding one year.(c)

"Provided that, if any one shall be convicted of carnal knowledge, and abusing a woman child under ten years, such offense shall be felony without clergy.

"Provided, that any person admitted to the benefit of clergy shall notwithstanding the same be put to answer other felonies, whereof he shall be indicted or appealed, not being thereof before acquitted, convicted, attainted, or pardoned, and shall in such manner be arraigned, tried, adjudged, and suffer such execution for the same, as he or they should have done, if as a clerk or clerks convict they had been delivered to the ordinary, and there had made his or their due purgation."

Upon this statute these points are clear.

1. That if before his clergy admitted, he had committed any other felony within clergy, he is cleared of them as well as of

(c) By 5 Ann. cap. 6. it is enacted, "That where any person shall be convict of larceny the judges shall award him to the work-house or house of correction, there to be kept without bail at the discretion of the judges, not less than six months, nor more than two years from the conviction, an entry whereof is to be made on record, and if such offender escapes he shall be committed to such house there to remain not less than twelve months, nor more than four years."

By 4 Geo. 1. cap. 11. and 6 Geo. 1. cap. 23. "The court may order any person convicted of larceny, or any felonious stealing of money, &c. within clergy, (except persons convict for receiving stolen goods, knowing them to be stolen,) instead of being burnt in the hand or whipt, to be transported to any of his Majesty's plantations in America, for the space of seven years; and persons convict for receiving stolen goods, knowing them to be stolen, or for offenses without clergy, but pardoned generally upon condition of transportation, to be transported for the term of fourteen years; and if any shall rescue or aid such offender to make his escape, or if such offender shall return or be found at large without leave before the expiration of his term in Great Britain or Ireland, he or they shall be deemed guilty of felony without clergy."

that whereupon he hath his clergy, for his burning in the hand is in lieu of his delivery to the ordinary and purgation.

2. That as to former felonies out of clergy he is not discharged by his admission to clergy, but shall be put to answer them.

3. That by his conviction he forfeits all his goods that he hath at the time of the conviction, notwithstanding his burning in the hand.

4. That yet by his burning in the hand he is put into a capacity of purchasing and retaining other goods, [389] because the statute taking away delivery to the ordinary and purgation, which should have restored him to that capacity, gives him the capacity of purchasing and retaining other goods, and is in nature of a pardon.

5. That presently upon his burning in the hand he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof.

6. That altho he be not burnt in the hand, but the king pardons it, he is thereby put into the same condition, as if he were burnt in the hand, and rendered a person capable now to purchase and retain goods, altho the words of the statute are *after clergy allowed and burning in the hand he shall be delivered*. These are all points resolved in 5 Co. Rep. 110. a. Foxley's case, and P. 41 Eliz. Heston's case therein cited. (*)

7. And consequently after clergy and burning in the hand he shall not be proceeded against by the ecclesiastical judge to deprivation or other ecclesiastical censure, for it amounts to a pardon by the king, Hob. Rep. p. 288. Searle & Williams.

8. That notwithstanding this statute requires burning in the hand to discharge a clerk convict, yet a clerk in holy orders, viz. in the order of subdeacon or above shall not be burnt in the hand, but the privilege allowed them by the statute of 4 H. 7. cap. 13. to be saved from burning in the hand continues to them, 2 Co. Inst. 637.

9. And upon the same account they may have their clergy in cases within clergy a second time according to the statute of 4 H. 7. cap. 13. notwithstanding this statute.

10. That altho a clergyman in orders shall not be burnt in the hand, yet by virtue of the statute 4 H. 7. cap. 13. and of this statute after his discharge given by the court he shall have the same privilege as if he had been burnt in the hand, and therefore shall not be drawn in question in the ecclesiastical court to deprive him or inflict any ecclesiastical censure upon him. Hob. Rep. 288. Searle & Williams.

(*) Vide *supra* p. 278.

11. That notwithstanding this statute takes away delivery to the ordinary, and inflicts burning in the hand, yet the privilege of peers of parliament exempting them from reading and burning in the hand for the first offense is not hereby at all diminished or altered.

12. That the plea of *auterfoits convict* and had his clergy stands as a good bar to a new arraignment for the same felony, as it did before this statute.

13. That if a man be indicted of murder, and upon not guilty pleaded is found guilty of manslaughter, and prays his clergy, tho he neither be burnt in the hand, nor hath his clergy allowed, but the court will advise upon it, yet this stands as a good bar to a new indictment or appeal for the same felony, for the prisoner hath done what he can in praying his clergy, which prayer is recorded *petit librum*, and it is the act of the court to advise, and their delay in allowing him clergy, or burning him in the hand shall not prejudice the prisoner. 4 *Co. Rep.* 45. b. *Wigg's* case and *Holcroft's* case adjudged. *Co. P. C. cap.* 57. p. 131. (d)

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CHAPTER LV.

CONCERNING JUDGMENTS IN THE SEVERAL KINDS OF CAPITAL OFFENSES.

HAVING now gone through the preparatories to judgment, namely indictment, pleas, trial, and clergy, I come to consider of the judgments that are to be given in several capital offenses, and therein, 1. I will consider the several kinds of judgments. 2. Who are the judges, that may give them. 3. How and in [what manner.][1]

(d) This point was however much litigated, and at last solemnly settled in the case of *Armstrong* and *Lisle* T. 8. W. 3. B. R. rot. 565. Kel. 93. that a conviction of manslaughter, and that he was a clerk and ready to read, if the court would have allowed him, is a good bar to an appeal, altho the court had not called the defendant to judgment, but continued him over with a *curia advisare vult*.

[1] When the offence is capital, the prisoner is immediately or at a convenient time soon after asked what he has to say why judgment of death should not be pronounced against him, 4 *Bl. Comms.* 375; *R. v. Royce*, 4 *Burr.* 2086; 2 *Hawk. ch.* 48, § 2. But by *stats.* 4 *Geo. IV. chap.* 48, and 6 & 7 *Will. IV. chap.* 30, the court may record the sentence of death without pronouncing it in open court. The court may assess a fine but cannot award any corporal punishment unless the defendant be personally present, 2 *Hawk. ch.* 48, § 17; *E. v. Hann*, *Burr.* 1786; *R. v. Hollingbury*, 4 *B. & C.* 329; 6 *D. & R.* 345.

If the defendant is at large and will not attend voluntarily a *capias* is awarded

First, for the several kinds of judgments I shall consider these particulars.

1. What judgment is to be given in case of an acquittal of any capital offense.

2. What, when clergy is allowed.

3. What to be given against a person convicted of treason, as against the king.

4. What to be given in case of petit treason.

5. What, in case of felony.

6. What, in case of *peine fort & dure*.

I. The judgment *upon the acquittal* of the prisoner is either when he is acquitted by special plea, as of *auterfoits acquit*, or of a pardon, &c. or other matter in bar, or else when he is acquitted upon not guilty pleaded; and of these in their order.

If the prisoner pleads the king's pardon, the conclusion of his plea is ordinarily thus, *quarum quidem literarum domini regis (ac dicti brevis if there be a writ of allowance also pleaded,) prætextu prædictus T. H. petit quodd ipse de præmissis per curiam hic dimittatur &c. super quo visis & per curiam hic intellectis omnibus & singulis præmissis consideratum est, quodd prædictus T. H. eat inde sine die, &c.* and in the margin of the roll there is commonly entered *literæ patentes allocantur: sine die, &c.* and no other judgment is usually entered [392] in such case. *Rast. Entries 455. a. b.*

If the prisoner pleads *auterfoits acquit*, or convict, or attain de mesme felony, and avers it to be the same, (as he must,) the conclusion of his plea is, & hoc paratus est verificare, unde petit iudiciū, & quodd ipse de præmissis per curiam hic dimittatur, and sometimes and most commonly pleads over to the felony *not guilty*.

Et *David Waterhouse* armiger. coronator & attornatus domini regis in curiâ ipsius regis corâm ipso rege, qui pro eodem domino rege in hâc parte sequitur, pro eodem domino rege dicit & cognovit, quodd prædictus *Johannes Sayer*, qui modo comparet, & prædictus *Johannes* in inquisitione prædictâ nominatus per nomen *Johannis Sawyer*, nuper de *W.* in com. *S.* &c. est

to bring him in to receive judgment; and if he absconds he may be prosecuted to outlawry, 4 *Bl. Comms.* 375.

Where one already under sentence of imprisonment is convicted of a new offence, the court may pass a second sentence on him to take effect after the expiration of the first, *R. v. Wilkes*, *Burr.* 2577; *R. v. Williams*, 1 *Leach*, 536.

In felonies or misdemeanors the court may alter the judgment passed before it becomes matter of record and may pass another, *R. v. Price*, 6 *East*, 28; *R. v. Justices of Leicestershire*, 1 *M. & S.* 442; 2 *Hawk. ch.* 48, *sect.* 20; *Fletcher's case*, *R. & R.* 60; *R. v. Wyatt*, *R. & R.* 230. But not after its entry of record, *R. v. Walcot*, 4 *Mod.* 395; 2 *Salk.* 632.

una & eadem persona, and so goes along to all the averments modo & formâ, prout prædictus *Johannes Sayer* superius placitando allegavit, super quo visis & per cur' hic intellectis omnibus singulis præmissis tam in placito prædicto ipsius *Johannes Sayer* in formâ prædictâ placitat' & accordo convictionis prædict. quàm dicti domini regis attorney ejusdem placiti cognitione, consideratum est, quodd prædictus *Johannes Sayer* eat inde sine die *H. 5 Jac. B. R. Sayer's case*, where he pleaded *auterfoits* convict and had his clergy.

And judgment is in like manner entered, *H. 6. Jac. B. R.* in the case of *Francis Smith* upon *auterfoits acquit* pleaded, Et *David Waterhouse* armiger, qui pro domino rege in hac parte sequitur, viso placito prædicti *Francisci Smith* & diligentèr per ipsum examinat' præmissis, pro eo, quodd evidenter & manifestè apparet eidem *David Waterhouse*, quodd placitum prædictum per præfatum *Franciscum* superius placitatum &c. hoc non dedicit sed placitum illud ex parte dicti domini regis in omnibus fatetur, & cognovit fore verum: Idèd ut supra eat sine die.

The like form of judgment, viz. quodd eat sine die was antiently used in case of *auterfoits acquit* pleaded. 2 *E. 4. John Hodgson's case*.

And note, this judgment of *eat sine die* is of two kinds, sometimes it is special, sometimes it is general.

If *A.* bring an action of covenant against *B.* and a [393] special verdict is found, but upon the perusal of the declaration a fault therein appears, Et quia videtur curiæ, quodd narratio est insufficiens, consideratum est quodd querens nihil capiat per billam, sed quodd defendens eat inde sine die, this judgment shall not be a bar in another action; because special, and not given upon the verdict, but upon the insufficiency of the declaration; otherwise it had been, if given generally, for it should have been intended upon the verdict and merits of the cause. *T. 1650. Eales & Lambert.(a)*

In a *quare impedit* by the king issue is joined and found for the defendant, at the day in bank it is alleged in arrest of judgment, that no patron is named in the writ, the judgment shall be entered generally, quodd eat sine die, and not specially upon the plea in abatement, but it seems, it shall not bar the king in a new action, for the *eat sine die* shall be applied to the plea to the writ: vide 3 *H. 4. 2 & 11.(b)*

(a) This case (but not this point) is reported in *Styl. 37, 54, 73.*

(b) This case, (which is obscurely stated by our author,) appears from the year-book to have been thus. A *quare impedit* was brought by the king, and a verdict past for the defendant, upon which the defendant prayed judgment, but the counsel for the king desired, that the writ might abate, because it was brought against the incumbent only, and not against the patron, but this was refused, because the king was stoppèd from abating his own writ; then they prayed, that if judgment

But it seems, that if a man pleads a plea in bar of the indictment, as *autrefois acquit*, or a pardon, yet if the indictment be insufficient, upon the reason of *Vaux's* case 4 *Co. Rep.* 45. a. the *eat sine die* shall be applied for the advantage of the king to the insufficiency of the indictment, and not to the plea in bar; *quære tamen, non obstante Vaux's case.*

It is reason to have the *eat sine die* special in that case, ed quodd indictmentum prædictum apparet minus sufficiens, ided consideratum est, quodd eat sine die, and then it is applicable only to the insufficiency of the indictment.

If a man plead not guilty and is acquitted, antiently the judgment was not only, *quodd eat sine die*, but ided [394] *consideratum est, quodd eat inde quietus*, tho it were at the king's suit, *quod vide Rast. Entries* 51. a. 2 *E.* 4. in the case of *Hodgson* before cited, and so in the case of *Smith* before cited, *viz. H. 6 Jac.* and accordingly *H. 3 Jac. B. R. Rast. Entries* 57. *Ided consideratum est, quodd idem T. sit inde quietus, & eat sine die. Rast. Entries, fol. 385. Gaol-delivery* 6, 7, 10, 11.

Yet at common law without the aid of 18 *Eliz.* he might be bound to his good behaviour, if it were testified he was of ill fame, and shall be committed till he find sureties. *Rast. Ent. 385. Gaol-delivery* 5.

And if the entry were such, I do not think the prisoner could ever be arraigned again notwithstanding the insufficiency of the indictment, till that judgment of acquittal were reversed, for *eat inde quietus* cannot go to the insufficiency of the indictment, but must go to the matter of the verdict.

But indeed in *Vaux's* case, 4 *Co. Rep.* 44. a. who was acquit by verdict upon *not guilty* pleaded, the judgment is only *Ided consideratum est, quodd prædictus Willielmus Vaux de felonis & murthero prædicto in indictmento prædicto superius specificat. necnon de dictâ felonis venenatione prædicti Nich. Ridley in eodem indictmento nominat. eidem Willielmo imposit. eat sine die, not eat inde quietus*: he was afterwards indicted *de novo* and pleaded the former acquittal, and yet because the indictment was not sufficient, he was put to plead to the felony, and had judgment and was executed.

The truth is the best reason to maintain that judgment is that, which is given by my lord *Coke, P. C.* 214. in these

were enterd against the king, the cause thereof should likewise be enterd, but this also was refused by the court as needless, and the judgment enterd generally, *quodd defendens eat sine die*, (the same judgment, that should be in case the writ had been brought against the patron and incumbent, and it had been found against the king,) because the king will receive no prejudice thereby, for if this judgment should afterwards be pleaded in bar, the king might reply, that judgment was given against the writ, because the patron was not named therein.

words, In the case of acquittal the judgment is, *quodd eat sine die*, which may be given as well for the insufficiency of the indictment, as for the party's innocence or not guiltiness of the offense, and the judges of the cause ought before judgment to look into the whole record, and upon due consideration thereof to cause it to be enterd, *idèò consideratum est, quodd eat sine die*.

This is the best reason to support that judgment, but if the judgment had been, *quodd eat indè quietus*, as the antient form is in case of acquittal upon *not guilty* pleaded, that [395] could never refer to the defect of the indictment, but to the very matter of the verdict; and if in *Vaux's* case the judgment had been so enterd, he could never again have been indicted for the same offense, notwithstanding the defect of the indictment, till that judgment reversed by writ of error, tho, as it was, that judgment in *Vaux's* case was one of the hardest that ever I met with in criminal causes, for where the prisoner excepts to the insufficiency of the indictment, or the court doth it *ex officio*, the judgment is special, *quodd indictamentum ob insufficientiam cassetur, & quodd the prisoner eat indè ad præsens sine die*.

If a man be indicted of homicide *se defendendo*, or *per infortuniam*, he must plead to it or confess it, and there is no judgment of death given against him, but *remittitur prisonæ*, or baild *ad expectand. gratiam-regis*.

But if a man by the coroner's inquest be found to have kild a thief, that assaulted him to rob him or to commit a burglary, which is not felony, he shall neither be arraigned nor put to answer upon that indictment, but shall be dismissed without any judgment.

But if he had been indicted of murder or manslaughter, and upon *not guilty* pleaded the special matter is found, or the jury acquits him, the judgment shall be *quod eat indè quietus*, and it is a perpetual discharge; and if he be found guilty *se defendendo*, yet the judgment given thereupon, *quod expectet gratiam regis* is a perpetual bar to another indictment. *Co. P. C. cap. 101. p. 213, 214.*

II. The judgment in case of allowance of clergy is thus, Super quo adtunc & ibidem quæsitum est per cur. domini regis de eodem *Johanne*, si quid pro se habeat vel dicere sciat, quare curia domini regis hic ad judicium & executionem de eo super veredictum prædictum procedere non debeat; idem *Johannes* dicit, quodd ipse est clericus, & petit beneficium clericale sibi in eâ parte allocari, & tradito eidem *Johanni* libro idem *Johannes* legit ut clericus, super quo consideratum est per curiam hic, quodd idem *Johannes* in manu suâ lævâ cauterizetur & delibere-

tur, and the execution is accordingly enterd, & instantèr crematur in manu suâ lævâ, & deliberatur juxta formam statuti.

And if he be a nobleman, and be demanded wherefore judgment should not be given upon the verdict, [396] he may aver, that he is a peer of the kingdom *habens locum & vocem in parlamento*, and pray the benefit of the statute of 1 *E. 6. cap. 12.* and if it appear so in the indictment, or in case it do not, if the court be ascertained thereof either by writ of *certiorari* to the clerk of parliament, or if it be confessed by the king's attorney, then the judgment is idèo consideratum est quòd deliberetur secundùm formam statuti in hujusmodi casu edit. & provis.

And if it be alleged, that he is a clerk in holy orders, then it shall be enterd after his reading, Et quia curiæ hic constat per certificationem Episcopi, &c. or per literas testimoniales Episcopi, quòd ipse est clericus in sacris ordinibus constitutus, viz. in ordine subdiaconatûs, ideo considerat. est per curiam, quòd deliberetur secundùm formam statuti in hujusmodi casu edit. & provis. sine cauterizatione. And the like, if he plead the king's pardon of burning in the hand.

And if a layman pray his clergy, and it appear of record, that he had it before, then the entry is, Et quia per inspectionem recordi coram domino rege hic missi &c. quòd aliter idem *J. S.* indictatus existit &c. setting out the effect of the record, & quòd ipse est eadem persona, & hoc idem *J. S.* non dedit, idèo consideratum est, quòd privilegium clericale eidem *J. S.* non alloçetur, & quòd suspendatur per collum quousque &c.

And so if he prays his clergy, [and cannot read,] Et tradito ei per curiam libro idem *J. S.* non legit ut clericus, idèo considerat' est, quòd suspendatur per collum, quousque mortuus fuerit.

III. The judgment in high treason against the king for conspiring his death, or levying war, or for a priest upon the statute of 27 *Eliz. cap. 2.* or for any new treason made by authority of parliament is in this manner.

First the king's serjeant or attorney juxta debitam legis formam petit versus ipsum *E. D.* super veredict' prædict' judicium & executionem pro dicto domino rege habend'. &c. but this is not of absolute necessity, for the court *ex officio* ought to give judgment.

Et super hoc visis & per curiam hic pleniùs intellectis omnibus & singulis præmissis considerat' est, quòd [397] prædictus *E. D.* ducatur per vicecomitem com' *Middlesex*, or per marescallum hujus curiæ, or per constabular' turris *London* usque marescalciam &c. or usque turrim *London*, or usque gaolam domini regis com' prædicti (according as the

prisoner is in custody,) Et de inde per medium civitatis *London* directè usque ad furcas de *Tiburne* trahatur, & super furcas illas ibidem suspendatur, & vivus ad terram prosternatur, & interiora sua extra ventrem suam capiantur(e) ipsoque vivente(d) comburantur, & caput ejus amputetur, & corpus ejus in quatuor partes dividatur, & caput & quateria illa ponantur ubi dominus rex ea assignare voluerit.

But if the prisoner be in the king's bench and the judgment be given in that court, the entry is quòd prædictus *J. S.* ducatur per prædictum marescallum usque prisonam marescalciæ domini regis coram ipso rege, & de inde ad quendam locum executionis, vocat. *St. Thomas Watringes*, trahatur, & supra furcas ibidem suspendatur, and so forward as in the judgment.

Thus the judgment was entered against *Barkly* a seminary priest upon an indictment in *Middlesex*, *P. 38 Eliz.* upon the statute of *27 Eliz.* But the judgment against a woman in all cases of high treason is to be drawn and burnt. *Co. P. C. 211.*

Upon an indictment of treason for counterfeiting the king's coin, the judgment is only, as in petit treason, viz. quòd ducatur usque gaolam domini regis de *Newgate* per vic' com' *Middlesex*, & ab inde usque ad furcas de *Tiburn* trahatur & ibidem suspendatur, quousque mortuus fuerit.

And the judgment against a woman is also, as in petit treason, to be burnt. *25 E. 3. 42.(e)*

This is agreed of all hands, but as to clipping or impairing of coin [there hath been some doubt,] and likewise as to counterfeiting of foreign coin made current by proclamation, because these are new created treasons. *Co. P. C. p. 17.*

But yet in cases of clipping or washing made treason [398] by the statute of *5 Eliz. cap. 11.* & *18 Eliz. cap. 1.* the judgment is now settled to be only drawn and hanged, as in case of counterfeiting of the coin of the kingdom by *25 E. 3. de prodicionibus* and this was agreed, and accordingly judgment given against two *Frenchmen, Hill*, *25 Car. 2.(f)* according to the book of *T. 6. Eliz. Dy. 230. b.*

And with this agrees the resolution of *24 H. 8.* in justice *Spilman's* reports cited *2 Co. Inst. p. 636.* A priest drawn and hanged for clipping the king's coin, and yet clipping was not held to be treason within the statute of *25 E. 3.* but made so [by the statute of *3 H. 5. cap. 6.* according to the common opinion

(c) *Secreta membra amputentur* is here sometimes inserted, *Show. cases in parliament p. 187.* but it is not of necessity, vide the sentence in lord *Derwentwater's* case, *Stat. Tr. Vol. VI. p. 16.*

(d) These words *ipsoque vivente*, or others tantamount are absolutely necessary, otherwise the judgment is erroneous. See *2 Salk. 632. Show. cases in parliament p. 127. Rex versus Walcot.*

(e) *N. Edit. 85. b.*

(f) *Bellou & Norman, 1 Ven. 254.*

and the recital of the statute of 5. *Eliz.*](*g*) and so repealed by the statute of 1 *Mar. cap.* 1. yet even while that statute of 3 *H.* 5. was in force, the judgment was only drawing and hanging in that case.

And upon search of precedents both in the king's bench and at the *Old Baily*, tho some precedents were of hanging drawing and quartering for clipping, yet the most usual were only drawing and hanging.(*h*)

And upon the same reason I think, that in case of counterfeiting of foreign coin made current by proclamation, made treason by the statute 1 *Mar. cap.* 6. and the clipping or washing thereof, likewise made treason by 5 and 18 *Eliz.* I think there ought to be no other judgment but drawing and hanging, for by the proclamation and the act of 1 *Mar.* it is now become as the coin of this realm, and it were an incongruous thing for a man to be hanged and quartered for counterfeiting foreign coin made current by proclamation by interpretation of the statute of 1 *Mar.* and yet to be only drawn and hanged for counterfeiting the proper coin of the kingdom.

For counterfeiting the great or privy seal certainly there was antiently no other judgment but that of petit treason, namely drawing and hanging, as appears by the book [399.] of 2 *H.* 4. 25. *a.*,(*i*) and the record of that case, tho my lord *Coke* excepts against it in *P. C. p.* 15.[2] *sed de his vide quæ supra dixi Part I. cap.* 16. *p.* 187.

IV. The judgment in petit treason is for a man to be drawn and hanged, for a woman to be drawn and burnt, as also in high treason, *Co. P. C. p.* 211. for the other judgment is unseemly for that sex.[3] *Stamf. P. C. Lib. III. cap.* 19. *fol.* 182. *b.*

V. The judgment in all cases of felony is *quod suspendatur per collum, quousque mortuus fuerit*. [4]

(*g*) In the original MS. the words in this place are, *By the statutes of 5 & 18 Eliz. according to the common opinion and the recital of those two statutes:* but it appears by what follows, that the statute of 3 *H.* 5. was intended here to be mentioned, nor is it recited in the statute of 18 *Eliz.* but only in that of 5 *Eliz.*

(*h*) *Vide Part I. p.* 352.

(*i*) *Clement Peycin's case, vide Part I. p.* 181. *in notis, & p.* 352.

[2] See Notes to Chap. 26, Vol. I. pp. 351, 353, 354.

[3] By stat. 9 *Geo. IV. chap.* 31, *sect.* 2, "every offence which before the commencement of this act would have amounted to petit treason shall be deemed to be murder only and no greater offence, and all persons guilty in respect thereof, whether as principals or as accessories shall be dealt with, indicted, tried and punished as principals and accessories in murder."

[4] The stat. 7 & 8 *Geo. IV. chap.* 28, which abolished benefit of clergy pro-

But if a man be outlawd of treason or felony, tho there be no other judgment, but *utlegatus est per iudiciū coronatorum*, yet it is of itself an attainder and subjects the offender to an award thereupon to be made by the court, where he is brought, as is suitable to the offense, for which he is indicted and outlawd.

And this judgment is as well to be given against a nobleman as another in case of felony, and cannot be given otherwise by the court, or executed otherwise by the sheriff. *Co. P. C. p. 211 & 52.(k)*

VI. The judgment of *peine fort & dure* at this day in case of felony is only where the prisoner stands mute of malice upon his arraignment or will not directly answer, for upon challenging above twenty his challenge shall be only over-ruled, *(l)* and the trial proceed.

But at common law in all cases of felony and at this day in petit treason, if he challenge thirty-six peremptorily, he should have his judgment of penance, *(m)* and this holds as well in an appeal as in an indictment, and as well in case of women as men. *2 Co. Inst. 177. super stat. Westm. 1. cap. 12.*

The entry of the judgment is thus:

Et quæsitum est per curiam ab eo qualiter se velit inde acquiescere, qui dicit, quod ipse non vult se super aliquam juratam patriæ ponere, nisi solummodo in Deum; tunc insuper dictum est ei per curiam hic, quod nisi aliter in hac parte respondeat mori debet, qui dicit, quod non vult aliter
[400] respondere in hac parte nisi ut prius, idem considerat^r est, quod idem *R. B.* ducatur ad prisonam marescalciæ domini regis coram ipso rege, & ibidem nudus præter baccas suas ponatur ad terram super dorsum suum directè jacens, & foramen in terrâ sub ejus capite fiat & caput ejus in eodem ponatur, & super corpus suum ubi libet ponatur tantum de petris & ferro, quantum portare potest & plus, quamdiu vivit, & quod habeat de pane & aquâ pessimis & prisonæ ei proximis, & illâ die quâ comedit non bibat, neque illâ die quâ bibit non comedat, sic vivendo quousque mortuus fuerit. *(n)*

And if he stands wholly mute, then the entry is thus:

Et allocutus quomodo se velit de felonis prædictâ ac-

(k) Vide Part I. p. 501.

(l) Supra p. 270, 314.

(m) Supra p. 268, 316.

(n) Vide supra cap. 43. p. 319. *Rast. Entr. fol. 385. pl. 2.*

vided that no person convict of felony should suffer death unless it were for some felony which before that time was excluded from benefit of clergy. Other felonies to be punished as specially provided by statutes.

quietare, qui quidem *R.* nihil respondet, sed se mutum tenet, & super hoc capitā inquisitione per sacramentum 12 &c. si prædictus *R.* loqui possit, vel si prædictus *R.* prædicto die &c. loquutus fuerit necne, qui dicunt super sacramentum suum, quod prædictus *R.* loquutus fuit. isto eodem die & bené loqui potest si velit, idem idem *R.* ut ipse qui legem recusat, hoc eat ad pœnam &c. *ut supra.* Catalla ipsius nulla.[5]

And sometimes also the jury were charged to inquire *si malè credatur*, but that was but rarely in case of an indictment,(o) for the indictment itself carries a probability, that he may be guilty when joined with his own wilful refusing his trial, so that he forfeits his goods by such standing mute.

VII. Judgment in petit larciny is only to be whipt, or imprisoned by way of chastisement.(p)

VIII. Judgment in misprision of treason is forfeiture of all his goods, forfeiture of the profits of his land during his life, and imprisonment during his life.(q)

IX. Judgment in theftbote is fine and imprisonment.

CHAPTER LVI.

[401]

CONCERNING GIVING OF JUDGMENT, BY WHOM, AND WHEN.

WHAT courts have jurisdictions in causes criminal and capital have been handled before in the beginning of this Part; I am now to consider when one judge may give judgment upon a conviction before another judge, and how.

The king's bench is the center of all subordinate jurisdictions, especially in matters capital.

If *A.* be indicted of felony before justices of peace, *oyer* and *terminer*, or gaol-delivery, and be convict by verdict or confession, if the record of the conviction be removed into the king's bench by *certiorari*, and the prisoner also be removed thither by *habeas corpus*, that court may give judgment upon that con-

(o) *Vide* the case of *Thomas de la Hethe supra*, p. 322. in *notis*.

(p) But by subsequent statutes the offender may be transported. See 4 Geo. 1. cap. 11. and 6 Geo. 1. cap. 23. *vide supra* p. 388. in *notis*.

(q) *Part I.* p. 374.

[5] By statute 7 & 8 Geo. IV. ch. 28, sect. 2, where upon arraignment the prisoner shall stand mute of malice the court shall order a plea of "not guilty" to be entered on his behalf; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.

viction, but there must be first a filing of the record in the king's bench, and a commitment of the prisoner to the custody of the marshal, and he must be called to say what he can, why judgment should not be given against him, and thereupon judgment may be given: *vide* 23 *H. 8. cap. 1* & 11. 10 *H. 4. 9. a. Coron. 467.*

And indeed there was no other remedy before the statutes of 11 *H. 6. cap. 6.* & 1 *E. 6. cap. 7.* for judgment to be given upon persons reprieved before judgment, for the former commissions are determined by new ones at common law.

But if the conviction were not before the judge of the king's bench, so that the offender continued not always in custody of the marshal or of those that are his bail, but be removed by *habeas corpus* or brought in by process, the party so removed may plead he is not the same person and give some diversity of name, and if the king's attorney confess it, he shall [402] be discharged and process made out against the other person, thus it was done in the case of *John Apere, Lib. placitor' Coron. n. 7.* who was taken upon a *capias utlegat'* and pleaded he was not the same person.

Or the king's attorney may take issue upon it and aver him to be the same person, and known by one name or the other. 21 *E. 4. Surry. Lib. placitor' Coron. placito 31. Nicholas Browne's case.*

Or if he answers nothing but stands mute, it shall be inquired whether he be the same person by inquest, before judgment be given against him, for he shall not be concluded by the return of the sheriff either upon a *cepi corpus* or *habeas corpus*, if he was not always in custody of the same court from the time of his first arraignment, *vide accords* 10 *E. 4. 19. b.* but if he had been always in custody of the court of king's bench from the time of his arraignment, or had been bailed by the court, and came in and rendered himself upon his bail, then no such inquiry shall be made upon his standing mute. 10 *E. 4. 10. b.*

And that I may say it once for all, the same law is where a party is outlawd or abjured, and comes by *capias utlegat'* or other process into the king's bench, he shall be demanded what he can say why execution should not be awarded against him upon the record removed, which 7 *H. 6. 25. a. B. Coron. 44.* is called an arraignment; if he confess himself to be the same person, execution shall be awarded; if he deny himself to be the same person and the king's attorney confess it, he shall be discharged; if the king's attorney take issue upon it, it shall be tried; if the prisoner say nothing, it shall be inquired by an inquest of office whether he be the same person: *vide* 8 *H. 4. 9 &*

18 *B. Coron.* 22, 23. 10 *E.* 4. 19. *b.* *M. 5 Car. Croke*, p. 176. *Coze's* case.

If an issue be joined in the court of king's bench in an appeal of felony, or in an indictment of treason or felony either upon a record originally begun in that court, or removed thither by *certiorari*, the usual course now is to try it at the bar, or if it were removed by *certiorari* out of another county, to remit the record according to the statute of 6 *H.* 3. *cap.* 6. to the justices, before whom such indictment was originally [403] taken, with a writ to command them to proceed therein, whether the record was so remitted before or after issue joined in the king's bench.

But many times that court antiently did, and at this day may send down the transcript to be tried by *nisi prius*, as well in an indictment as an appeal, and upon the return thereof the court may give judgment of death or acquittal, according to the verdict returned: *quod vide sæpius L.*

But whether they might inquire of abettors there hath been diversity of opinions, *vide 2 & 3 P. & M. Dy.* 120, 121, 131. *b.* but by the better opinion they cannot, 10 *E.* 4. 14. *b.* 4 *Co. Inst.* 160. nor can they arraign the felon at the suit of the king, if the plaintiff be nonsuit in his appeal. 22 *E.* 4. 19. *a.* (*)

It hath been held by some, that justices of assise and *nisi prius* may by virtue of the statute of 27 *E.* 1. *de finibus cap.* 3. without any other commission deliver the gaol and give judgment of felons, *vide Stamf. P. C. Lib.* II. *cay.* 45. *fol.* 57. *b.* but yet that hath not been used, neither is it safe to be practised without a commission of gaol-delivery: *vide stat.* 3 *E.* 5. *stat.* 2. *cap.* 7.

But certainly at common law justices of *nisi prius* could not give judgment upon an appeal or indictment sent to them out of the king's bench by *nisi prius* to be tried, no more than in other ordinary civil causes, for they have but the transcript of the record before them, and their commission is only *ad triandum exitum*, and to remit the transcript with the verdict indorsed upon the *postea*. (†)

But by the statute of 14 *H.* 6. *cap.* 1. justices of *nisi prius* have power in all cases of felony and treason to give judgment of acquittal or attainder at the day and place where their inquisitions, inquests, and juries are taken, and then and there to award execution to be made by force of the same judgments.

But yet it seems this statute gave them not power to inquire of abettors in an appeal, nor to arraign the prisoner upon a nonsuit before them at the king's suit, 10 *E.* 4. [404]

(*) *Vide supra* p. 41.

(†) *Vide supra* p. 40.

14. b. 22 E. 4. 19. a. but this was to be done in the king's bench upon the return of the *postea*.

But upon this statute these things are to be observed.

1. That they might return the *postea* into the king's bench, and there, judgment may be given as at common law, for tho the statute gives them power to give judgment and award execution, yet it leaves them power to return the *postea*, and takes not away the power of the king's bench to give judgment and award execution upon the *postea* returned, as they might have done at common law.

2. That as the prisoner cannot be arraigned nor plead to issue in the king's bench, unless the record and also the prisoner be there, so the record itself still remains in the king's bench, and only the transcript delivered to the judges of *nisi prius* and not the record itself, as upon the statute of 6 H. 8. and yet upon that transcript the judges of *nisi prius* may give judgment and award execution by virtue of the statute of 14 H. 6. cap. 1.

But then the prisoner must either be sent down by *habeas corpus* to the sheriff of the county, where the *nisi prius* is, in custody, or else bailed to appear there, for no inquest can be taken by default, or in the absence of the prisoner in cases capital.

And if the prisoner be bailed by the king's bench to appear at the *nisi prius*, (as he may,) yet if he appear not, the inquest cannot be taken, but only the prisoner called upon his bail, and the default recorded, and so upon the return of the *postea* new process against the prisoner, and also against his bail.

At common law by granting a new commission of the peace all proceedings before former commissioners of the peace were discontinued, and if an issue were joined, or a person convicted, or had judgment, the new commissioners could not proceed to trial, judgment, or execution, but all that could be done was to remove the record by *certiorari* and the prisoner by *habeas corpus* into the king's bench, and there to proceed where the justices left off.

And to remedy this the statute of 11 H. 6. cap. 6. [405] was made, whereby it is enacted, "That such proceedings shall not be discontinued by such new commission, but the new justices after they have the records before them shall have power to continue the same pleas and processes, and the same pleas and processes and all that depend upon them to hear and finally determine, as the other justices might have done, if no new commission had issued."

By virtue of this statute new commissioners might not only give judgment upon conviction before former justices of peace,

but might award execution upon judgments given by the former justices, as shall be farther shewn.

But this statute extended not to commissions of *oyer* and *terminer* and gaol-delivery, but only to commissions of the peace. And therefore the statute of 1 E. 6. cap. 7. was made, which among other things enacts, "That where any person shall be found guilty of treason or any felony, for which judgment of death should be given, and be reprieved before judgment, new commissioners of gaol-delivery may give judgment upon such conviction, as the justices of gaol-delivery, before whom he was convicted, might have done."

"And that no manner of process or suit made, sued, or had before any justices of assise, gaol-delivery, *oyer* and *terminer*, of the peace, or other the king's commissioners shall in any wise be discontinued by the making and publishing any new commission or association, or by altering the names of such justices or commissioners, but that the new justices of assise, gaol-delivery, and other commissioners may proceed in *every behalf*, as if the old commission and justices and commissioners had still remained and continued not altered."

Tho this statute in the first part thereof mentions giving of judgment upon a person convict, yet I take it very clear they may award execution upon a party reprieved after judgment by former commissioners, for by the second clause they may proceed in *every behalf* as the former commissioners might have done, and therefore there is little cause for the *quære* made touching that point in *Dyer*, (g) yet I have generally observed this one rule, that I would never give judgment, or award execution upon a person reprieved by any other judge but myself, because I could not know upon what ground or reason he reprieved him. (h)

(g) *Dyer* fol. 165. a.

(h) The usefulness of this caution may be seen from what is observed by Sir John Hawles in his remarks on *Cornish's* trial, *State Tr.* Vol. IV. p. 203. where he relates the case of some persons "Who had been convicted of the murder of a person absent barely by inferences from foolish words and actions; but the judge before whom it was tried was so unsatisfied in the matter, because the body of the person supposed to be murdered was not to be found, that he reprieved the persons condemned; yet in a circuit afterwards a certain unwary judge, without inquiring into the reasons of the reprieve, ordered execution and the persons to be hanged in chains, which was done accordingly; and afterwards to his reproach the person supposed to be murdered appeared alive."

CHAPTER LVII.

CONCERNING EXECUTIONS.

MUCH of what concerns this matter hath fallen in under the former chapter, and therefore I shall be brief in it. I shall consider,

1. Who may award execution.
2. In what manner it is to be awarded.
3. By what warrant to be made.
4. By whom it is to be done.
5. In what manner.
6. Concerning reprieves or respite of judgment or execution.

I. As to the first of these it hath been dispatched in the former chapter, they that may give judgment may award execution.

And therefore the court of king's bench upon an *habeas corpus* and a *certiorari* to remove the body of a prisoner and the record of his outlawry or attainder before them may [407] award execution upon him. *M. 5 Car. B. R. Croke p. 176. Coxe's case, vide quæ dicta sunt supra cap. 56.*

II. Touching the manner of it there be certain cases, wherein tho the prisoner be attainted, yet he is not to have execution awarded against him; till he be demanded what he can say why execution should not be awarded against him, *viz.*

1. Where a woman is convicted and attaind by judgment, tho she remains always in custody, so that *constat de personâ*, yet execution is not to be awarded against her till she be demanded what she can say why execution should not be awarded, for she may allege pregnancy, which, tho it be no cause to respite judgment, is a good cause to respite execution.

2. Where the judgment was given at a former session, for in that interval between this and the former session he may have a pardon to plead.

3. Where the prisoner hath not always remained in the custody of the court, where he first had judgment, for in that case, if he be brought in by a *capias* by the sheriff, he shall not be concluded, but that he may say he is another person, and issue may be taken upon it, and that issue shall be tried before he shall have execution awarded against him, and if he stands mute, it shall be inquired whether it be of malice. 10 E. 4. 19. b. Again,

4. If judgment were given in another court, or by other

justices, as in case where a record of an attainder comes from another court by *certiorari* into the king's bench, or if a man be outlawd for felony, and the outlawry either removed or returned into the king's bench, and the felon brought in by *habeas corpus* or *capias utlegat'* he shall be demanded what he can say why execution should not be awarded against him, which 7 H. 6. 25. a. is called an arraignment, for in these cases,

1. He shall not be concluded by the return of the sheriff from saying he is not the same person that was outlawed, and upon that, issue may be joined, and it shall be entered of record and tried, (*) unless the king's attorney confesseth it: *vide supra* cap. 56.
2. He may have the king's pardon to plead.

3. In case of an outlawry he may assign error in the [408] outlawry, and pray respite to purchase a writ of error, and the court usually in such a case prefixeth him a day, and gives him respite to purchase a writ of error, and in the mean time remits him to the marshal and respites his execution.

Thus it was done in the case of *David Dene*, H. 16. B. 4. *Placit. cor. n. 57.* who was taken by a *capias utlegat'* returnable in the king's bench, *Et statim quassitum est ab eo, si quid pro se habeat vel dicere sciat, quare ad executionem de eo super utlegariâ prædictâ procedi non debet.*

He allèged, that at the time of the outlawry pronounced he was in prison in the tower of *London*, *Et statim quassitum est ab eo per cur' si habeat aliquid breve de errore necnè, qui dicit quodd non; idèd injunctum est eidem David ex gratiâ per curiam, quodd ipse breve de errore in hâc parte habeat coràm domino rege in octabis Hillarii, and upon his failure a second and a third peremptory day was assigned him, at which day he shewed to the court a writ of error and assigned the same error in fact, and issue was taken upon it, and a *venire facias* returnable in *Mich.* term, the prisoner still remaining in custody, and execution respited till the issue tried.*

But it is to be noted, that he that will delay his execution by alleging error in the outlawry and praying liberty to purchase a writ of error, must allege error in fact, or error in law upon the outlawry to obtain that respite of execution before his writ of error be brought, for if the court be satisfied, that it is merely a pretense, they may chuse, whether they will allow him a day to sue forth a writ of error, but may award execution presently. 1 H. 7: 13. b. *John Collin's case, vide Co. P. C. p. 212.*

If either the prisoner himself, or any as *amicus curiæ*, inform the court of any error in the outlawry, the court *ex officio* must

(*) *Kel. 13.* The case *Barksted, Okry and Capet.*

prefix him a day to purchase his writ of error, and in the mean time respite execution, but if he purchase not his writ in convenient time, execution shall be awarded.

III. By what warrant the execution is to be made.

In the king's bench there is no other writ nor warrant [409] but an award of the court upon the judgment, viz. Et dictum est marescallo, quodd faciat executionem periculo incumbente, for in the king's bench the marshal is the immediate officer of the court to make execution in these cases, for that court never gives judgment against any, that is not *in custodiâ marescalli* in cases capital, and so are all the antient and modern precedents, vide 3 H. 7. 7. a. M. 5 Car. B. R. Cro. p. 176. *Coze's* case, and so was directed by the court upon view of the precedents themselves mentiond in my lord *Coke's* book of *Entries*, Tit. *Indictment per totum*, P. 25 Car. B. R. in *Brown's* case. (a)

When an attainer of felony or treason is against a nobleman, the judgment is pronounced by the lord high steward, and the warrant for execution is under his precept and seal in his own name. Co. P. C. p. 31.

When judgment is given by commissioners of *oyer and terminer*, regularly the precept for execution should issue to the sheriff in the name and under the hands and seals of three of the commissioners, whereof one to be of the *quorum*, before whom judgment was given, Co. P. C. p. 31. but by usage (as far as I can learn of late times,) it is now done only by leaving a calendar with the sheriff declaring their judgments. (*)

When a man hath judgment of death before justices of gaol-delivery, the regular way is, either to issue a precept to the sheriff, in the names of the commissioners, reciting the judgment, and commanding execution to be done, or otherwise by an award upon the record, Et dictum est per curiam hic vicecomiti comitatûs prædicti, quodd faciat executionem periculo incumbente.

But of latter time there is no more done, but after judgment entered the judge subscribes a calendar in paper, directing the several judgments of deliverance of the parties acquitted, or the execution of the parties condemned.

Only *Rolle* would never subscribe any such calendar, [410] ** but would command the sheriff openly in court to take notice of the judgments and orders of what kind soever, and command the sheriff to execute them at his peril.

(a) 3 Keb. 193. 1 Vent. 243.

** Vide Part I. p. 501.

(*) Supra p. 31.

The reason of the difference between justices of gaol-delivery and of *oyer* and *terminer* is this; all the precepts, that issue at a sessions of *oyer* and *terminer*, as for a *venire facias tales*, &c. ought in true order of law to be by precept in the names and under the seals of the justices, but the precepts by justices of gaol-delivery need not be otherwise than by a simple award upon the roll: *Ided præceptum est vicecomiti, quodd venire faciat hic &c.*

IV. By what officer execution is to be made.

Regularly the officer, that is to make the execution, is that officer in whose custody by law the prisoner is at the time of the judgment given, for into his custody he is to be remanded after judgment pronounced, and there to stay till judgment executed.

Therefore, where judgment is given at the sessions of gaol-delivery, the execution is to be made by the sheriff, or his under-sheriff or deputy, for regularly he is in his custody ordinarily, but if the prisoner be in the *Tower of London*, (which is oftentimes the case of persons indicted for great treasons,) and he be arraigned before justices of *oyer* and *terminer*, he is commonly brought before them by a precept to the constable of the *Tower*, (which is an exempt prison from that of the sheriff,) and if he be convict and attaint, he is commonly remitted thither, and the precept or warrant for execution must go to the lieutenant or constable of the *Tower*, for it is pursuant to the judgment, viz. *quodd prædictus E. ducatur per præfatum locumtenent' turris London usque ad dictum turrin, & deinde per medium civitatis Lond. directè trahatur usque furcas de Diburn &c.* And thus it was done in the cases of the traitors at the powder-treason 3 *Jac.* But usually a command or precept is made to the sheriffs of *London* and *Middlesex* to be assisting to the lieutenant.

If the prisoner be arraigned in the king's bench either for treason, or felony, he is or ought to be always first [411] committed to the marshal, and by him is to be brought to the bar upon his trial and judgment, and to him he is to be remitted after judgment till execution, and wheresoever the felony or treason was committed, yet the marshal is to make execution, for he is in this case the immediate officer to the court, and the prisoner is not in the custody of any sheriff, but of the marshal.

And therefore the entry in this case of felony is, *Et dictum est marescallo, Quodd faciat executionem periculo incumbente.*

But in case of high treason the marshal is mentioned in the very judgment, viz. *quodd ducatur per præfatum marescallum usque prisonam marescalli marescalliæ domini regis, & deinde*

usque ad furcas sancti Thomas. Watrings trahatur & ibidem suspendatur &c. thus is the entry of the judgment, *P. 44 Eliz.* against *Patrick Dalph B. R. T. 43 Eliz. B. R.* against *John Tipping, T. 39 Eliz. B. R.* against *John Jones.*

And in the case of *Brown P. 25 Car. 2.* that had judgment in the king's bench for felony upon the statute of 3 *H. 7.* for an offense committed in *Middlesex*, and there presented and convicted; the execution was made by the marshal in the usual place of execution in the county of *Surrey.*(*b*)

Only in these and the like cases the court gives order to the sheriff of the county, where the execution is made, to be assisting to the marshal.

V. As to the manner of the execution, as it is to be done by the proper officer; so it is to be done pursuant to the judgment.

The judgment in case of felony is, *suspendatur per collum, quousque fuerit mortuus.*

The sheriff may not alter the execution, if he doth, it is felony, and some say murder. *Co. P. C. p. 211, 217.(c)[1]*

If the party be hanged and cut down and revive [412] again, yet he must be hanged again, for the judgment is to be hanged by the neck *till he be dead.*(*d*)

The judgment in high treason is complicated, *viz.* hanging, beheading, imbowelling, &c..

The king may pardon all but the beheading, for this is part of the judgment, the judgment is not altered, but part of it remitted. *Co. P. C. p. 52.*

But this must be under the great seal. *Co. P. C. p. 31.*

2 Hawk. P. C. ch. 51. 4 Black. Com. ch. 32.

(b) The like was done in *Althoe's* case *T. 9 Geo. I. B. R. vide supra in notis Part I. p. 464.*

(c) *Vide Part I. cap. 42. p. 501. in notis.*

(d) *Vide Coron. 335.*

[1] See *Foster*, p. 267-8.

CHAPTER LVIII.

CONCERNING REPRIEVES BEFORE OR AFTER JUDGMENT.

REPRIEVES, or stays of judgment or execution are of three kinds, viz.

I. *Ex mandato regis*, thus we find it done in 3 H. 7. 7. a. tho ore tenus, or by some message, or by sending his ring, but at this day it is ordinarily signified by the privy signet, or by the master of requests.

II. *Ex arbitrio judicis*. Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment insufficient, or doubtful whether within clergy; and sometimes after judgment, if it be a small felony, tho out of clergy, or in order to a pardon or transportation. *Crompt. Just.* 22. b. and these arbitrary reprieves may be granted or taken off by the justices of gaol-delivery, altho their sessions be adjourned or finished, and this by reason of common usage. *Dy.* 205. a.

III: *Ex necessitate legis* which is in case of pregnancy, (e) where a woman is convict of felony or treason. *Co. P. C.* 17. *Stamf. P. C. Lib.* III. cap. ult.

1. *Enseinture* is no ground to stay judgment, and therefore if a woman convict be asked what she can say why judgment should not be given, *enseinture* is no cause of stay; but when judgment is given, she ought again to be demanded why execution should not be made, and there she may allege *enseinture in retardationem executionis*. 22 *Assiz.* 17. *Coron.* 180.

2. *Enseinture* is no cause to stay execution, unless she be *enseint* with a *quick* child, or which is all of one intendment, if she be *quick* with child. 22 *Assiz.* 71. *Coron.* 180.

3. When this is objected in delay of execution, it ought to be inquired of by a jury of twelve discreet women, and their verdict is to be recorded, and according as they give it the execution is to proceed or stay. *Ibid.*

4. This privilege is to be allowd but once, for if she be a second time with child, she shall not thereby delay execution, but the gaoler shall be punished for not looking better to her. 12 *Assiz.* 11. *Coron.* 168. 23 *Assiz.* 2. *Coron.* 188.

If she be *priviment enseint* and not *quick* with child, and only so found by the jury of women, that is no cause of respite;

(e) Thus it was by the civil law. *Dig. Lib.* XLVIII. tit. 19. *de penis* l. 3. and also by the laws of William the conqueror l. 35. *vide Bract. de Coron. cap.* 32. § 11. *Fleta Lib.* I. cap. 38. § 15. *vide Part I.* p. 368.

but I have rarely found but the compassion of their sex is gentle to them in their verdict, if there be any colour to support a sparing verdict.

6. This reprieve is or ought to be a matter of record, and therefore I have always taken it, that altho she be delivered before the next sessions, yet the sheriff ought not to make execution after her delivery, neither ought the judge to give such direction upon the reprieve granted, but at the next session the

woman must again be called to shew what she can say [414] why execution should not now be made, and she is to be heard 12 *Assiz.* 11. *Coron.* 168. *amesne al barre*, for it may be the *tempus præstitutum* for her delivery since the last sessions is not yet past, and she must stay till then, or it may be she hath since had the king's pardon, which the sheriff cannot allow nor judge of.

And therefore the books tell us, that after her delivery she was brought to the bar again to shew what she could say why execution should not be made; this bringing to the bar must needs be at a second or following sessions. 12 *Assiz.* 11. *Coron.* 168. 22 *E.* 3. *Coron.* 253.

A TABLE

OF

THE PRINCIPAL MATTERS

CONTAINED IN THE

TWO PARTS OF THIS TREATISE.

N. B. In the following Table, where there are no numeral letters, the pages referred to are in the first Part, and so are the pages which precede these letters, ii; but the pages, the numbers of which come after those letters in the Table, are in the second Part.

In the first *Part* (through mistake) after page 146 follows a repetition of the pages 143*, 144*, 145*, 146*, which are distinguished by asterisms both in the book at large, and in the Table; so in the second *Part* after page 156 ensues an iteration of page 149*, and of the successive numbers to 157 exclusive, which iteration or repetition is also pointed out by asterisms, as well in the Table, as in the book.

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*ib.*If party bailed by justice before commitment, or if committed and brought into *B. R.* or sessions to be bailed, then himself is also bound.*ib.*

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*ib.*When any is bailed for any misdemeanor by *B. R.* either on return of *habeas corpus*, or otherwise, the return or record ought to be first filed, and a *commititur marescallo* entered, and then bail taken.

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Whether it doth *constare de personâ occidentis*, or *de modo occidendi*, or not, yet if party indicted of manslaughter, or tho it were but *se defendendo*, justices of peace cannot bail. *ib.*

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3 *E. 1.* (*Westm. 1.*) tho it say *de morte hominis*, there is no bail at common law, it must be intended, when offender is certainly known; for it generally provides, that persons taken on a light suspicion shall be bailed. *ib.*

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- Where one indictment is against divers men, and the offenses are several, as in case of indictment against divers persons for keeping several disorderly houses, a *certiorari* removes it only as to those named in it; and as to the others record remains *below*; but *contra*, if justices *per manas suas proprias* deliver the bill into court against them all, as they may, and a record be made of that delivery. ii. 214
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Record removed and filed, at common law, no *procedendo* could be granted, nor record remitted; but *contra* by 6 H. 8. *ib.*

Difference between *certiorari* in *B. R.* and chancery: In *B. R.* record itself is removed, and what remains below is but a scroll; but usually in chancery, if *certiorari* be returnable there, tenor of record only is removed; and if tenor of record of indictment, attainder or conviction be removed by *certiorari* into chancery, and thence sent by *mittimus* into *B. R.* they cannot thereon proceed to judgment or execution. *ib.*

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CHALLENGE.

Challenge for want of freehold allowed in treasons, misprisions of treason, and murders by stat. 283

One outlawed in trespass, neither lawful juryman, nor indictor in felony or treason. 303. ii. 155*, 277

Whether father or son, or adversary in a suit, be a lawful juryman. *ib.*

Jurors to be freemen, regularly freeholders. 264

Legales, *i. e.* without any just exception. *ib.*

Division and subdivision of challenges. ii. 267

By common law, if one outlawed of felony, &c. brought error on outlawry, and assigned error in fact, whereon issue was joined, he should not challenge peremptorily. *ib.*

Like law, if he had pleaded any foreign plea in bar or indictment. *ib.*

But if one had been indicted or appealed of treason or felony, and had pleaded *not guilty*, or any other matter of fact triable by same jury, and pleaded over to the felony, he might have challenged peremptorily any jurors under the number of three whole juries. ii. 267, 268

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But in treason, if prisoner challenge above thirty-five, and insist on it, and will not leave his challenge, it amounts to *nil dicit*, and judgment of death shall be given. ii. 268

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In high and petit treason challenge of thirty-five now allowed, because 1 & 2 P. & M. restores trial of petit treason to the course of the common law. ii. 269, 339

In petit treason, if party challenge thirty-six peremptorily, he shall have judgment of penance, as well in appeals as indictments, and in case of women as well as men. ii. 399, 400

Acts ousting clergy in case of challenging above twenty, import, that by such challenge party should be convict; but yet if he challenge above twenty, he shall not have judgment of death, but only his challenge shall be overruled, and jurors shall be sworn. ii. 269, 270, 339, 345

If prisoner challenge six of the jurors for cause, and causes be found insufficient, and the six are sworn, whereby inquest remains *pro defectu juratorum*, a *tales* granted, and jury appear, the prisoner may challenge peremptorily any of the six; but if it happen, that a new cause of challenge intervene after former swearing, and he challenge for cause, he must shew the cause happened after former swearing. ii. 270, 274

If prisoner on first pannel challenge fifteen peremptorily, and then jury remains for default of jurors, and a *distringas* with forty *tales* is granted; he shall challenge peremptorily no more than will fill up his number. ii. 270

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No principal challenge either to array or poll, that sheriff or juror is of *king's* livery, but he must conclude to the favour. *ib.*

If alien be indicted or appealed of felony, tho' indictors ought to be *English*, yet by 28 E. 3. trial shall be *per medietatem lingue*, save in felony by *Egyptians*. *ib.*

This statute extends as well to felonies made after as before. *ib.*

Extends not to trial of aliens for treason. *ib.*

If alien indicted of felony plead *not guilty*, and a common jury be returned, if he surmise not *his being an alien*

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In treason or felony, whereto prisoner pleads *not guilty*, at common law four hundreders ought to be returned. *ib.*

35 *H. 8.* requiring six hundreders, and 27 *Eliz.* requiring only two in personal actions, extend not to trials on indictments of treason or felony. *ib.*

Yet never any challenge for default of hundreders on trial of indictments for felony or treason. *ib.*

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By 2 *H. 5.* none to be jurymen on trial of capital felony, unless he have a freehold of 40*s. per ann.* above all charges, if he be challenged, and by construction it must be land in same county. ii. 272, 273

He must not only be seised thereof at time of pannel made, but when he comes to be sworn; else may be challenged. ii. 273

27 *Eliz.* hath raised it to 4*l. per ann.* yet that extends only to issue joined in *B. R. C. B.* and Exchequer, and justices of assise, and not to justices of gaol-delivery, *oyer* and *terminer*, or the peace; but these trials stand as they did by 2 *H. 5.* *ib.*

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By statute, on trials of felonies in cities or boroughs, a citizen or burgher worth 40*l.* personal estate may pass, tho he hath no freehold, but Knights or Esqrs. living there, not within this provision. ii. 274

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By statute challenge allowed of any person living in the stews of *Southwark*, tho of sufficient freehold. *ib.*

Where prisoner challengeth for cause, he ought to shew it presently; must shew all his causes together. *ib.*

If in trial of indictment of felony eleven be sworn, and the twelfth challenged, whereby inquest remains, &c. and a *distringas* with a *tales* issues, and jurors appear, *king* shall not challenge any of the eleven sworn, save for cause happened since their swearing; if it happen before, tho not

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ii. 59

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ib.

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ib.

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ib.

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ib.

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ib.

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Grant of a judicial office, *quam diu se bene gesserit*, tho a freehold, is determined by his death. *ib.*

But grants of offices of a different kind, or of lands *durante beneplacito*, are not determined without some act or declaration by the successor. *ib.*

Forfeiture of goods for treason, same as forfeiture for felony; but a difference in grants thereof. *239*

A manor held of the *king*, as of his honour of *D.* escheats for felony of tenant, it is now parcel of the honour; but if it escheat for treason, it is no parcel of the honour; and if granted out generally, shall be held *in capite*. *254*

HABEAS CORPUS.

Where temporal judge might have taken notice incidently, whether a tenet was heresy or not, and *nient obstante* return of diocesan, have delivered party imprisoned on this writ. *400, 407, 408*

Cause necessary to be expressed in commitment, in order to be returned on *habeas corpus*. *584*

HABEAS CORPUS.—Continued.

It is *quasi* a writ of right, or error to determine, whether imprisonment good or erroneous. Page 584

Where justices of gaol-delivery may send prisoners by this writ to sheriff of another county out of their circuit. ii. 37

Of writ of *habeas corpus ad subjiciendum*, and bailing thereon ii. 143 to 148

What to be done on return being filed. ii. 143

Party to be remanded till return filed. ii. 146

Whence it issues. ii. 143, 144

When it issues out of *C. B.* or *Exchequer*, it is where party is privileged, or to charge him with an action. ii. 144, 312, 313

If one be sued in *C. B.* or is supposed to be so sued, and is arrested for a pre-supposed misdemeanor, or for felony, this writ lies there; and if it appears on return, that party is wrongfully committed, the privilege shall be allowed, and party discharged; or if doubtful, bailed to appear in *B. R.* ii. 144

If one be sued in *C. B.* and is arrested and imprisoned for felony &c. tho gaoler on *habeas corpus* ought to return the causes, as well criminal, as that wherewith he is charged out of that court, yet *C. B.* ought not to commit to the *Fleet*, nor discharge him, nor take bail to answer there, but may bail on the action, and remand him to sheriff as to the crime. 144

C. B. have now by *statute* original jurisdiction to bail, discharge, or commit on this writ one committed by council-table, as well as *B. R.* and that tho party hath no privilege. ii. 144, 145

B. R. and *Chancery* have an original jurisdiction to grant this writ and bail, &c. tho no privilege returned. ii. 145, 147

Of *habeas corpus ad faciendum & recipiendum* granted by *B. R.* when granted, and before whom returnable. ib.

If a civil action and matter of crime be returned, and action appear to be fraudulent, party may be remanded; if real, court may commit him to the marshal with his causes, tho they are matters of crime. ib.

On writ *ad faciendum*, &c. not singly a matter of crime ought to be returned, for that belongs to writ *ad subjiciendum*. ib.

When *habeas corpus* in criminal causes issues out of chancery, and cause is returned, chancellor may judge thereof, and may discharge or bail prisoner to appear in *B. R.* or may *propriis manibus* deliver record in *B. R.* and thereon *B. R.* may proceed to bail, &c. ii. 147

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But if chancellor discharge him not, but bail him, surety must be to appear in *B. R.* or if chancellor will do neither, he may commit him to *Fleet* till term, and then he may be turned over to *B. R.* and there proceeded against; chancellor hath no power to proceed in criminal causes.

ii. Page 147

Habeas corpus (before 31 *Car. 2.*) in criminal causes should regularly have issued out of chancery in vacation, and *B. R.* in term. *ib.*

Sending *habeas corpus ad faciendum & recipiendum* by chancellor for persons arrested in civil causes not warranted by law, and as to persons in execution, forbidden by statute. ii. 148

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By whom *habeas corpus* to be signed.

ii. 211

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HOMICIDE.

The several kinds of homicide. 424

Homicide defined. 425

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In this case, indictment must find special matter, or if indictment be of murder or manslaughter, and on trial it appear to be involuntary, how jury to find. *ib.*

Prisoner in such case must plead *not guilty*. 471, 478

Division of involuntary homicide. 471

Homicide *per infortunium* defined and exemplified. 472

If one shoot at butts, and by casualty his hand shakes, and arrow kills a by-stander *per infortunium*. *ib.*

So if a carpenter or mason in building casually let fall a piece of timber, &c. and kills another. 472, 475

But if he voluntarily let it fall without giving due warning whereby it kills another, it will be at least manslaughter, *quia debitam diligentiam non adhibuit*. *ib.*

So if one be felling a tree in his own ground, and it fall and kill another, chance-medley. *ib.*

HOMICIDE.—*Continued.*

Tho chance excuseth from felony, it excuseth not from trespass. Pages 472, 475

If two play at barriers, or run a-tilt by *king's* command, and one kill the other, it is *per infortunium*; but without it, manslaughter. 473

If a school-master correct his scholar, &c. who by struggling, or otherwise dies, only *per infortunium*. 474

But if correction be with a *lethal* instrument, or outrageous, it is murder. ib.

Several come to enter the house of *A.* as trespassers, *A.* shoots and kills one, manslaughter; *contra* if they had entered to commit a felony. ib.

Where, on an alarm that thieves were breaking into the house in the night, the master killed a servant hid in a buttery thro fear of being discovered by them, (the servant being mistaken for one of the thieves, and not discerned in the dark) it was held no felony; *quære*, whether homicide *per infortunium*. ib.

If one knowing that people are passing along the street throw a stone, or shoot an arrow over the house or wall, with intent to do hurt, and one is thereby slain, this is murder; and if without such intent manslaughter, and not *per infortunium*, because *act* unlawful. 475

One, in shooting at a deer in his own park, by accident kills another man, homicide *per infortunium*, but *contra*, if it be in the park of a stranger without his licence, then it is manslaughter. 475

A. throws a stone at a bird, and thereby kills a man, to whom no harm intended, *per infortunium*. ib.

But if he had thrown it to kill the poultry, or cattle of *B.* and the like accident had happened, it had been manslaughter, but not murder; because not with intent to hurt the by-stander. ib.

An *act* prohibits shooting in a gun without such a qualification, and under a penalty; one unqualified shoots with a gun at a bird, and it kills a by-stander by some accident, that in another case would have amounted only to chance-medley; this no more than chance-medley in him, keeping a gun in such case, being only *malum prohibitum*. 475, 476

A servant set by his master to watch in the night in a corn-field with a gun charged, and ordered by him to shoot when he heard any bustle in the corn by deer; master himself improvidently rushes into the corn, servant supposing

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HOMICIDE.—*Continued.*

it to be deer, shoots and kills his master, only chance-medley, because servant misguided by his orders. *Page* 476

But if master had not given such orders, it would have been manslaughter, because he did not *adhibere debitam diligentiam* to discover his mark. *ib.*

A. drives his cart carelessly, and it runs over a child in the street, if *A.* having seen the child, yet drives on upon him, it is murder; but if he saw not the child, manslaughter; but if child had run cross the way, and cart run over it before it was possible for carter to stop, it is *per infortunium*. *ib.*

If one riding in the street whip his horse to put him into speed, and run over a child and kill him, homicide, and not *per infortunium*; and if he had rid so in a press of people with intent to do hurt, and horse had killed another, it had been murder. 476

But if one be riding in the street, a by-stander whips the horse, whereby he runs away against will of rider, and runs over and kills a man, it is chance-medley only, in which case jury are to find the special matter; yet where coroner's inquest finding special matter stands untraversed, court will receive verdict of *not guilty* on indictment by grand inquest, and party confessing indictment by coroner, shall have his pardon of course. 476, 477

Killing another *per infortunium*, not in truth felony, how verdict concludes; party forfeits his goods, and why; tho he ought to have *quasi de jure* a pardon of course, yet he is not to be discharged, but bailed till next term or sessions to sue out such pardon. 477

Homicide *ex necessitate*, partly voluntary, partly involuntary. 478

Necessity of two kinds: 1. Of a private nature. 2. That which relates to public justice and safety. *ib.*

Former obliges one to his own defense and safe-guard, and what inquiries this takes in. *ib.*

Two kinds of homicide *se defendendo*, and respective consequences thereof. *ib.*

Homicide *se defendendo* defined. 479

What circumstances therein observable. 479 to 484

There being malice between *A.* and *B.* they appoint time and place to fight, and meet, *A.* gives first onset, *B.* retreats as far as he can with safety, and then kills *A.* who had otherwise killed him, murder; because they met by compact. 479

There being malice between *A.* and *B.* they meet casually;

HOMICIDE.—Continued.

A. assaults *B.* and drives him to the wall; *B.* in his own defense kills *A.* this *se defendendo*. Page 479

A. assaults *B.* and *B.* presently thereon strikes *A.* without flight, whereof *A.* dies, this is manslaughter; but if *B.* strike *A.* again, but not mortally, and blows pass between them, and at length *B.* retires to the wall, and being pressed on by *A.* gives him a mortal wound whereof *A.* dies, only *se defendendo*. *ib.*

A. by malice makes a sudden assault on *B.* who strikes again, and bearing hard on *A.* *A.* retreats to the wall, and in saving himself kills *B.* whether murder, or *se defendendo*; what fact the question depends on. 479, 480

In homicide *se defendendo*, some *act* to be done by party killing, for if he be merely passive, only *per infortunium*. 480

A. assaults *B.* who flies to the wall, or falls holding his sword, &c. in his hand, *A.* runs violently, or falls on knife, &c. of *B.* without any stroke or thrust offered by *B.* and dies, *per infortunium*; *quare*, whether *A.* *felo de se*. 480, 481

He, who kills in his own defense, ought to fly, as far as he may, to avoid violence of assault, before he turn on assailant. 481, 483, 486

Argument against duelling. *ib.*

If gaoler be assaulted by prisoner, or sheriff, or bailiff in execution of his office, he is not bound to give back to the wall; but if he kill assailant without such retreat, only *se defendendo*. *ib.*

The like of a constable, or watchman. 481

But if prisoner resists not, but flies, yet officer for fear of rescue gives prisoner a mortal stroke, it is murder; for here was no assault first made by prisoner, and so cannot be *se defendendo* in officer. 481

Difference between civil actions and felonies. *ib.*

If one be in danger of arrest by *cap.* in debt, &c. and he flies, and bailiff kills him, murder. *ib.*

But if felon flies, and cannot be otherwise taken, if he be killed, justifiable, and officer forfeits nothing; but person killed forfeits his goods. *ib.*

A thief assaults a true man, either abroad, or in his own house, to rob or kill him, true man not bound to give back, but may justify killing assailant, and it is no felony. *ib.*

If *A.* assault *B.* so fiercely, that *B.* cannot save his life, if he

HOMICIDE.—*Continued.*

give back, or if *B.* fall to the ground, whereby he cannot fly, if *B.* kills *A.* it is *se defendendo*. Page 482

Where first assailer may be said to kill the assailed *se defendendo*, or not. 482 to 484

If *A.* assault *B.* and *B.* thereon re-assault *A.* and *A.* flies to avoid the assault of *B.* who pursues him, and then *A.* being driven to the wall turns again, and kills *B.* whether *se defendendo*. 482

But if *A.* assaults *B.* first, and *B.* re-assaults *A.* so fiercely, that *A.* cannot retreat to the wall, or other *non ultra*, without danger of his life, nay, tho' *A.* fall on the ground on the assault of *B.* and then kills *B.* murder or manslaughter. *ib.*

Where one is assaulted so fiercely, that he cannot fly, law will interpret this necessity to a flight to give him the advantage of *se defendendo*; but *contra*, where first assailant is re-assaulted so vigorously that he cannot fly, law will not let him take advantage of this necessity, the consequence of his own wrong. *ib.*

Where *A.* the first assailant flies, and the affray is interrupted, and *B.* the first assaulted pursues *A.* to kill him, and *A.* after his flight, on necessity of saving his life, kills *B.* it is but *se defendendo*; but when done altogether, without any interval of flight or parting, and *B.* gains the present advantage by his address or courage to preclude flight of *A.* and then *A.* kills him, manslaughter. 483

Flight to gain advantage of *se defendendo* to party killing must not be feigned, or to gain advantage of breath, &c. it must be from the danger, as far as party can, either by reason of some wall or other *non ultra*, or as fierceness of assailant will permit. *ib.*

Whether party killing was guilty of first breach of peace, considerable in these cases. *ib.*

What offense, if one kill another in the necessary saving of the life of a man assaulted by party slain. 484

A. assaults the master, who flies as far as he can to avoid death, servant kills *A.* in defence of his master, it is homicide *defendendo the master*, and servant shall have his pardon on course: so where master kills in necessary defence of servant. *ib.*

Like law where husband kills in defence of wife, parent of child, and *é converso*. *ib.*

How far relation of acquaintance, and mutual society will excuse one companion killing in necessary safe-guard of life another. *ib.*

HOMICIDE.—*Continued.*

Killing one attempting to rob or kill another in case of necessity puts him in condition of *se defendendo* his neighbour.

Pages 484, 485

A woman kills a man assaulting to ravish her in the attempt, *se defendendo*. 485

So it is, if husband or father kill him in the attempt, if it could not be otherwise prevented; but if it might, it is manslaughter. 485, 486

What the offense in killing him, that takes the goods, or doth an injury to the house or possession of another, herein many differences, as between a trespassable and felonious *act*, and felonious *acts* themselves. 485 to 489

If *A.* pretending title to the goods of *B.* take them away from *B.* as a trespasser, *B.* may justify beating *A.* but if he beat him, so that he dies, it is manslaughter. 485, 486

A. is in possession of *B.*'s house, *B.* endeavours to enter on him, *A.* can neither justify assault, nor beating of *B.* because *B.* had right of entry; but if *A.* be in possession of a house, and *B.* as trespasser enters on him, *A.* may *molliter manus imponere* to put him out, and if *B.* resist, and assault *A.* then *A.* may justify beating him *de son assault demesne*. 485

But if *A.* kill him in defence of his house, it is manslaughter. 485, 486, 487

A. being in possession of a house by title, *B.* endeavoured to enter, and shot an arrow at them within, and *A.* from within shot an arrow at those that would have entered, and killed one of them; not *se defendendo*, but manslaughter, because no danger of *A.*'s life from them without. 485, 486

If *B.* had entered into the house, and *A.* had *gently laid his hands* on him to turn him out, and then *B.* had turned on him and assaulted him, and *A.* had killed him, so if *B.* had entered on him and assaulted him first, and *A.* had killed him, it had been only *se defendendo*, tho entry of *B.* was not to murder, but as a trespasser to gain possession. 486

A. in such case being in his own house need not fly as far as he can. 486

Husband kills adulterer in the *act*, manslaughter. *ib.*

Difference between killing a man attempting an *act*, which is felony or otherwise, as to making it *se defendendo*, &c. *ib.*

If one come to rob me, and take my goods as a felon, and I

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kill him, it is *me defendendo* at least, and in some cases justifiable. Page 486

At common law, if a thief had assaulted a man to rob him, and he had killed him in the assault, it had been *se defendendo*; but *quære*, whether he had forfeited his goods. 487.

One attempting a burglary with intent to steal, or kill, or attempting to burn the house of another, if owner of the house, or any within had shot and killed the person so attempting, this had been no felony or forfeiture. *ib.*

By 24 H. 8. killing any one attempting any robbery or murder in or near the highway, &c. or in a mansion-house, or attempting to break a mansion-house in the night by any person, &c. he who kills (tho a lodger or servant) shall be absolutely acquitted and discharged of the death of such person. *ib.*

There being malice between *A.* and *B.* and having fought often, and afterwards meeting suddenly in the street, *A.* said he would fight him, *B.* declined it, and fled to the wall, and called others to witness it, and *A.* pursued and struck him first, and *B.* in his own defence killed him, he was acquit from any forfeiture by this *act*. 487, 488.

Trespasses in houses, or in or near highways, are left as before this *act*. 488

It doth not indemnify killing a felon, where felony not accompanied with force as killing one attempting to pick a pocket. *ib.*

What breaking of a house in the day this *act* extends to, or not. 488

One attempting wilful burning of a house is killed in the attempt, the killer is free from forfeiture without aid of this *act*. *ib.*

If any felon, after felony committed, resist those that attempt to take him, or fly and be killed, this killing no felony; but this *act* relates not to it. *ib.*

If a felon before arrest resists and flies, or after arrest escapes and flies, and the officer, not being able to take him without killing, kills him, officer shall be found *not guilty*; but if he could have been taken without killing, it is manslaughter at least in the officer, and jury is to inquire, whether done of necessity or not. 489, 490

So where private man without warrant, of necessity kills a felon resisting and flying before arrest, or after arrest escaping and flying, tho felon not indicted, it is justifiable,

HOMICIDE.—*Continued.*

for in such case, law makes every one an officer to take a felon. *Pages 587, 588. ii. 77, 78, 82*

A felon is taken, and in bringing to gaol escapes, villagers pursue and of necessity kill him, they shall be acquitted.

Page 489, 490

A felony done, but not by *A.* and *B.* hath a warrant, or *hue* and *cry* comes to *B.* as constable to take *A.* *A.* attempts an escape, or resists, *B.* kills him of necessity, tho *A.* be not indicted, justifiable. *490*

In all cases of homicide by necessity matter may be specially presented by grand or coroner's inquest, and thereon party may be presently discharged without being put to plead, but may be indicted again, if former indictment false; *contra*, where indictment simply of murder or manslaughter.

491, 492. ii. 158

Exposition on 21 *E. 1. de malefactoribus in parcis.* *491*

Cases, where prisoner is not to forfeit his goods, but be acquitted, re-capitulated. *493, 494*

A. shooting at rovers, if *B.* after arrow delivered of his own accord runs into the place, where it is to fall, and so is killed, *A.* forfeits nothing, *quare.* *492*

If coroner's inquest find specially *se defendendo*, party shall be arraigned and tried, whether it was in his own defence or not, before he shall have his pardon of course. *493*

A constable, who commands *king's* peace in an affray, is resisted, he need not give back to the wall, and if he kill those that resist, it is justifiable. *494*

Killing a rioter, who resists, by sheriff, justice of peace, or constable, or his assistants, no felony at common law, nor makes any forfeiture. *53, 294, 495, 496*

What authority *homicide in execution of justice* requires in the judge and officer, who executes the judgment. *497*

Where judge hath jurisdiction, tho he err, officer in executing judgment justified; *contra*, where judge hath no jurisdiction. *501*

If after or before arrest *A.* an innocent man suspected draws his sword and assaults *B.* the party suspecting, and *B.* presseth on him, either to take or detain him, and in conflict *A.* kills *B.* it is murder; but if *B.* kills *A.* justifiable. *ii. 83*

If before or after arrest, bailiff on assault made on him kills the party, it is justifiable, neither is he bound to retreat. *ii. 83, 118*

If persons pursued by peace-officers for felony, or breach of peace or just suspicion thereof, as night-walkers, &c. shall

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not yield themselves to these officers, but either resist or fly before taken, or being taken rescue themselves, and resist or fly, and are on necessity slain; no felony in officers or assistants, tho parties killed are innocent.

ii. *Pages* 85, 86

By their resistance against authority of the *king* in his officers, they draw their own blood on themselves, and are accessaries to their own death. ii. 86, 118

One charged with suspicion of felony on just grounds, and where a felony is actually done, tho he be innocent, yet if he resist officer after notice that he is such, and assault him, and officer kill him, no murder: ii. 92, 93

If he fly, and cannot be otherwise taken, whether officer may kill him. 490. ii. 93

One is dangerously wounded, and constable is killed on pursuit of offender, murder; but if he kills offender, justifiable.

ii. 94

A warrant issues against one for trespass, or breach of the peace, and he flies, and will not yield to arrest, or being taken escapes, and officer kills him, murder. ii. 117

But if he either on attempt to arrest, or after arrest assault officer who hath the warrant, with intent to escape, and officer standing on his guard kills him, necessity excuseth him, and he is not bound to retreat. ii. 117, 118

Where a warrant issues against a felon, or only as one suspect, and either before or after he flies and defends himself with stones, &c. so that officer kills him on necessity, no felony: and so where constable doth it *virtute officii*, or on pursuit of *hue* and *cry*. ii. 118

But where warrant is against one suspect only, what cautions to be used. ii. 118, 119

Private man may arrest a felon; if he kill him of necessity, he is excusable; but then it is at his peril that he be a felon; if not at least manslaughter. ii. 119

In case of justifiable homicide, or that which is not felony, what coroner's inquest to find, and how indictment to be, and what proceedings to be had therein in order to discharge the prisoner. ii. 303

In indictment or appeal of felony defendant cannot justify, but shall have advantage of it on general issue. ii. 304

Felony committed by *B.* but *A.* that arrests him, knows it not, law same as if he knew it, only what he does is at his peril. ii. 78

Vide FORFEITURE, INDICTMENT, JUDGMENT, MURDER AND MANSLAUGHTER.

HOMINE REPLEGIANDO.—*Vide* BAIL.

HOUSE.

Where assembly to defend one's house justifiable; it is a man's castle of defence. *Pages* 445, 487, 547

If one be assaulted in his house by a trespasser attempting to gain possession, he need not fly as far as he can, for he hath the protection of his house to excuse him from flying.

486.

Where an assault, battery or homicide is excusable or justifiable, in defence of possession of a man's house, or not.

Vide HOMICIDE, MURDER AND MANSLAUGHTER.

HUE AND CRY.

A good warrant to pursue and take criminals without warrant of justice of peace, and tho no constable be in pursuit; and killing any of the pursuants by malefactor, murder; all malefactors in same field principals in the murder. 465

Constable and vill bound to pursue, or else fineable. 588.

ii. 99, 102

One present at commission of a felony bound to endeavour to take felon, or raise *hue* and *cry*. *ib.*

It is the old common law process after felons, and such as have dangerously wounded another. ii. 98

By *Westm.* 1. persons on *hue* and *cry* not pursuing felons, how punishable. *ib.*

By 4 *E.* 1. how and in what cases to be levied. *ib.*

Statute of *Winton* makes a further provision touching *hue* and *cry*. ii. 98, 99

Levied and not pursued, an article inquisible in the *leet*. ii. 99

Tho sometimes proper to have a justice of peace to direct his warrant for raising *hue* and *cry* yet not of necessity, or sometime convenient. ii. 99, 100, 102

Pursuants in constable's assistance may plead the general issue on 7 & 21 *Jac.* therefore expedient constable be called to this action. ii. 99, 100, 104

Yet may be raised by country in his absence, which is called *cry de pais*. ii. 100

If raised, and no felony committed, or on an innocent man, how they that raised it are punishable. ii. 102, 104

Where murder to kill pursuants, tho without warrant or constable. 465. ii. 100

What party raising it is to do, and what duty of constable thereon. ii. 100, 101

Pursuants on a supposed felony, not actually committed, may arrest and proceed, as if real felony done. ii. 101, 102

There needs no averment that a felony was done in justifica-

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HUE AND CRY.—*Continued.*

tion of imprisonment on *hue* and *cry* levied. ii. *Pages* 101,
102, 104

Yet it must be averred, that an information was given that the felony was done, if arrest be by that constable that first received the information, and so raised the *hue* and *cry*; or if arrest was made by that constable or those vills to whom *hue* and *cry* came at second hand, what must be averred. ii. 104

As *hue* and *cry* neither describes, nor names person of felon, but only felony done; and therefore arrest of person is left to discretion of constable, or people of second or third vill; he that arrests any one on such general *hue* and *cry* must aver that he suspected, and shew a reasonable cause of suspicion. *ib.*

If one pursued on *hue* and *cry* be in a house, and doors shut, and refused to be opened, constable on demand, &c. may break open doors. ii. 102

Same law on dangerous wound given, and *hue* and *cry* levied on offender. *ib.*

If offender cannot be otherwise taken may be killed. *ib.*

Constable on *hue* and *cry* may search in suspected places within his vill, yet his entry must be *per ostia aperta*, for he cannot break open doors barely to search, unless party be there. ii. 103

It is a sort of process, whereby constable may arrest by description. *ib.*

Pursuants to take such as they have probable cause to suspect. *ib.*

Who are suspicious persons. *ib.*

Where they that live and have land in the hundred are competent witnesses, or not, in action against hundred. ii. 280,
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HUSBAND AND WIFE.—*Vide* COVERTURE.

IDEOT, LUNATICK AND MADMAN.

Regularly no incapacities excuse the parties from damages to be recovered against them in a civil action for any *act* done by them; but *contra*, where proceedings are *ad pœnam*. 16

Ideocy, *madness*, and *lunacy*, fall under the general name *dementia*. 29

Tho by law no man shall avoid his own *act* for these defects, tho his heir or executor may, yet as to capital offenses he hath the advantage thereof. *ib.*

Ideot described; *ideocy* or *not*, how tried. *ib.*

IDEOT, LUNATICK AND MADMAN.—*Continued.*

- Dementia accidentalis, vel adventitia*, from what causes it proceeds. *Page* 30
- Distributed into a partial and total insanity. *ib.*
- Of partial insanity. 30, 412
- It seems not to excuse party in doing any capital offense. 30
- Most offenders under a degree of partial insanity, when they commit their offenses. 30, 412
- Difficult to define indivisible line, that divides perfect and partial insanity. 30
- It must rest on circumstances. *ib.*
- Caution against inhumanity towards defects of human nature, and *è contra*, against too great indulgence to great crimes. *ib.*
- What measure of understanding is sufficient not to excuse in capital offenses. *ib.*
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- Accidental *dementia*, whether total or partial, distinguished into *phrensies* and *lunacy*. 31
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- When such persons are in the height of their distemper. *ib.*
- One absolutely mad for a day, killing another in that distemper is equally *not guilty*, as if mad without intermission. *ib.*
- When lucid intervals ordinarily happen. *ib.*
- Crimes committed by lunaticks during their lucid intervals are subject to same punishment, as if they had no such defect. *ib.*
- Alienations and contracts made during such intervals bind their heirs and executors. 30
- Accidental *dementia*, whether *temporary* or *permanent* is, either *furor*, &c. or *delirium*, &c. *ib.*
- The causes and effects of *furor*, &c. and so of *delirium*, &c. *ib.*
- Dementia affectata*, or drunkenness regularly excuseth not except in two cases, and what these are. 32
- Easy to counterfeit madness. *ib.*
- Degrees whereof various, some sufficient, some not, to excuse in capital offenses. 32, 33
- How madness with respect to offenders to be tried. 33
- Ideocy*, &c. how tried in order to the commitment or custody of person and estate. *ib.*
- King* has an interest in an *ideot*, but in case of a *lunatick* it is only a trust in him. *ib.*
- Party found *ideot*, &c. may be brought before chancellor or *king* for inspection. *ib.*

IDEOT, LUNATICK AND MADMAN.—*Continued.*

All men of age of discretion supposed *sane*, unless contrary proved, and that as well in cases civil as criminal. *Page 33*

If one be a *lunatick*, and hath *lucida intervalla*, and this be proved, yet law presumes acts or offenses of such a person to be committed in those lucid intervals, unless contrary appears, and that as well in civils as criminals. *34*

In civil causes he, who alledges an *act* done in time of lunacy, must strictly prove it so; yet in criminals (where court is to be so far of counsel with prisoner, as to assist in matters of law, and true stating the fact,) if a lunatick be indicted of a capital crime, and this appear, witnesses must be examined, whether prisoner under actual *lunacy* at time of offense done. *ib.*

Surdus and *mutus a nativitate* presumed an *ideot*, unless contrary appear; if so, he may be tried and executed, tho caution to be used herein. *34*

If one, while *sane*, commit a capital offense, and before arraignment become absolutely mad, he ought not to be arraigned during such phrensy, but remitted to prison till he recover. *34, 35*

If such a man after his plea, and before trial, become of *non sane memory*, he shall not be tried; or if, after his trial, he become so, he shall not receive judgment; or if after judgment, his execution shall be spared and why. *35*

Proper to impanel a jury to inquire *ex officio* touching such insanity. *ib.*

If a madman commit homicide during his insanity, and continue so till he comes to be arraigned, he shall neither be arraigned nor tried, but remitted to gaol, to remain in expectation of *king's* grace. *ib.*

But fit in such case to swear a like inquest *ex officio*. *ib.*

If one in a phrensy happen by some over-sight to plead to indictment, and is put on his trial, and it appears to the court that he is mad, judge in discretion may discharge jury of him, and remit him to gaol to be tried after his recovery; but if there be no colour of evidence to find him guilty, or there be pregnant evidence to prove his insanity at time of fact done, in favour of life and liberty, it is fit that the court proceed to trial in order to his acquittal and enlargement. *35, 36*

One during his insanity commits homicide or petit treason, and recovers his understanding, and being indicted or arraigned for same pleads *not guilty*, he ought to be acquitted, *quia non felleo animo*. *36*

IDEOT, LUNATICK AND MADMAN.—*Continued.*

No difference whether phrenzy permanent or temporary, provided fact be done, while party under that distemper.

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Such insanity as excuseth in *homicide*, excuseth in treason. *ib.*

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Ignorance of law or penalty excuseth not one of age of discretion, or *compos mentis* from penalty of the breach of it; but in some cases *ignorantia facti* excuseth. 42

Ignorantia eorum, quæ quis scire tenetur, non excusat. *ib.*
Where ignorance of the person excuseth in homicide. *ib.*

Jac. 1. issued several commissions of gaol-delivery, &c. justices went their circuit, *king* died, yet they proceeded, tho in strictness of law they were determined by *king's* demise, yet judges were excused. 499

Ignorantia juris in some cases excuseth a judge, much more *ignorantia facti.* *ib.*

Receipt of felon after attainder in same county makes not person accessary without notice. 323

Every man within vill bound to take notice of constable in the day, tho not in night without notice. 461

Sufficient notice that a man is a bailiff by saying *I arrest you.* *ib.*

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Appeals of treason by particular persons ousted by 1 *H.* 4 impeachments by the commons frequent, because rather *quasi* grand indictments than appeals. 349. *ib.* 150*

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Ordinarily no incapacity excuses these persons, that are under them, from civil actions; but *contra*, where proceedings are *ad pœnam*. 16

In all cases of infancy, &c. if one incapable to commit a felony be indicted by grand inquest, and thereon is arraigned, petit jury may either find him generally *not guilty*, or the matter specially. 28

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Indictment for counterfeiting *king's* coin ought to shew particularly what kind of coin, but, tho usual to express the numbers, unnecessary. ii. 187

For clipping or impairing coin, &c. it must pursue the words of 5 & 18 *Eliz.* and conclude *contra formam statuti*; and this not only in case of clipping foreign coin, but also the coin of *England*. 220

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Indictment against receiver of a traitor must be special of the receipt, and not generally that he did the thing, which may be otherwise in case of a procurer, counsellor or consenter. 238

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If *A.* be indicted of murder, and *B.* as accessory *before* by procurement, and *A.* is found guilty of manslaughter only *B.* shall be discharged. 437

How indictment to be against persons present and assisting to a murder. *ib.*

Where *A.* came with *B.* to beat *C.* and *B.* beat him till he died, indictment antiently set forth the matter specially, but now it only runs that *A.* was present aiding and assisting. 410

Indictment of murder requires these words, *felonice ex malitia sua premeditata interfecit & murtheravit*, of simple homicide only *felonice interfecit*. 450, 466. ii. 186, 187, 344

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Where *homicide* is within 1 *Jac. of stabbing*, usual to prefer two indictments; one of murder, another on the *act*, and put prisoner to plead to both, and to charge jury first with indictment of murder, and then with the other on the *act*, because if convict on either, clergy ousted. 468.

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How indictment on this *act* to be to oust clergy. 468

It need not conclude *contra formam stat.* because it makes not the offense, but ousts clergy. *ib.*

Tho none ousted of clergy but he who stabs, yet being formed on the *act* is a good indictment of manslaughter against those who were present and assisting, and thereon principal in first degree may be convict of single manslaughter, and acquit of manslaughter on the *act*. 468, 469

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In *homicide of necessity* grand inquest may present the special case, and party be presently discharged; but he may be indicted *de novo*, if matter false; *contra*, if indictment simply of murder or manslaughter. 491, 492

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A. indicted *quod primo die Maii secundo Eliz. apud C. habens in manu, &c. gladium, &c. [felonice] percussit, &c.*

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- and not said *adtunc & ibidem, male*; because *day, year and place* relate only to the having the sword, not to the stroke. ii. *Pages* 178, 179
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- Indictment against *A.* that he *apud N. in com. præd.* assaulted *B.* of *O. in com. præd. & ipsum adtunc & ibidem cum, &c. percussit* nought; it cannot refer to both; and if only to one, it must be to the last, and then it is insensible. ii. 180
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- Indictment charges that *J. S. fidem adhibens* to the prisoner, and *nesciens potum præd. cum veneno fore intoxicatum accepit & bibit*, and says not *venenum præd. nought*, not to be supplied by implication. ii. 184
- Indictment *quod A. exoneravit tormentum, &c. versus B. dans ei unam mortalem plagam*, without saying *percussit*, nought. *ib.*
- So if *dedit mortalem plagam*, without *percussit*. *ib.*
- If *A.* be indicted, *quod 1 Dec. &c. apud, &c. felonice, & ex malitiâ suâ præcogitatâ in & super B. insult. fecit, & cum quodam, &c. adtunc & ibidem percussit, &c.* these words *felonice & ex malitiâ suâ* applied to the assault run also to the stroke, because placed in the beginning of the sentence, and done *adtunc & ibidem*. 184, 185
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- If killing was with a sword, it must be shewn in what hand offender held it. *ib.*
- In dextrâ suâ*, without saying *dextrâ manu, nought*. *ib.*
- Price of weapon to be set down, or else must be said to be *nullius valoris*. 419. ii. 185
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Wound laid *circiter pectus*, ill. ii. Page 186

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But *super faciem*, or *caput*, or *dextram partem corporis*, or *infima parte ventris*, certain enough. *ib.*

Where length and depth of wound to be shewn or not. *ib.*

If in evidence it appear to be another kind of wound in another place, indictment maintained. *ib.*

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If one be indicted and appealed before same justices for same murder or other felony, where there shall be a *cesset processus* on the indictment; and so where there is an inquisition before the coroner of murder, and returned, and likewise indictment for same offense by grand inquest. ii. 221

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A. indicted as having given the mortal stroke, *B.* and *C.* as present and assisting, if proved that *B.* gave the mortal stroke, and *A.* and *C.* were present and assisting, it maintains indictment, and all oust of clergy; *contra* on such indictment on 1 *Jac. of stabbing*, he that gave the stroke in such case shall have his clergy. 437, 463. ii. 185, 292, 344, 345

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In case of burglary or robbing houses, on what statutes principal to be indicted to oust accessory *before* of his clergy. 363, 364

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but he must be indicted of robbery in proper county.

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If *A.* be indicted of *larciny* in foreign county, and jury find value to be only 12*d.* he shall only have judgment of petit *larciny*, tho it appear on examination on trial, that it was a robbery. 536

Larcinies committed of several things, tho at several times, and from several persons, may be joined. ii. 173

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Quodd felonice cepit 20 oves matrices & agnos, or *matrices & verveces*, ill; but *contra*, if 20 oves generally. *ib.*

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The form of the caption, and the *analysis* thereof, *Norfolk ad generalem sessionem, &c.* *ii. 165 to 169*

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Court, where presentment made, to be exprest. *ib.*

It must appear where sessions held, and that place, where held is within extent of commission; and therefore, if *Dorset* in the margin and caption be *ad generalem sessionem pacis tent. apud S.* and says not *in comitatu præd.* it is nought. *ib.*

So if west-riding *in comit' Eborum* be in the margin, and caption be *apud S. in com. præd'* it shall be quashed, because not said *apud S.* in west-riding *in com. præd.* *ib.*

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Indictment grounded on offense by statute must bring it within substantial description of it; otherwise *contra formam stat.* will not supply it. ii. 168, 192, 193

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If *act* be prohibitory, and by a substantive clause gives a recovery of penalty by action of debt, but is silent as to indictment, party may be indicted on prohibitory clause, and thereon fined, but not to recover penalty, but fine ought not to exceed it. ii. 171

But if *act* be not prohibitory, but only if any shall do such a thing, he shall forfeit 5*l.* to be recovered by action of debt, &c. but mentions nothing of indictment, he cannot be indicted for it. ii. 171

If one be indicted for offense, which was at common law, and indictment concludes *contra formam stat.* but in truth is not brought within the *act*, it shall be quashed. ii. 171, 172

One indicted for *arson*; on *not guilty* pleaded, a special verdict was found, which was adjudged no felony; on same indictment he was adjudged to pillory, &c. *sed quære*, for

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- A general *act* need not be recited, but it is sufficient to conclude *contra formam stat. in hujusmodi casu edit. & provis.* but if misrecited, court takes notice of true statute, and rejects misrecital as surplusage. ii. 172, 173
- But if recited, and misrecited in a point material, and concludes *contra formam stat. præd.* it is fatal, and indictment quashed. ii. 172
- Where *act* is repealed and re-enacted, or temporary, and expires, or continued to the end of next session, and before it is continued over, how indictment to conclude as to *contra formam, &c.* 667, 706. ii. 173
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- If *several* offenders commit one offense, tho in law they are several offenses, yet they may be joined. *ib.*
- So if offenses be of *several* degrees, but dependent one on another, as in the case of principal in first degree, and principal in second degree, and accessory *before or after.* ii. 173
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- Where *divers* persons are inserted in one indictment, the word *separatim* makes them several. *ib.*
- The *grammatical order* of the several parts of an indictment. ii. 174, 175
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- Sessions held 20 *May*, offense supposed on 10 of *May last past*, it shall relate to *day*, and not *month*, and so for the words *next ensuing.* ii. 178
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- fecit, & ipsum verberavit*, and says not *adtunc & ibidem verberavit*, good; *vi & armis, day and place* named in beginning refer to all ensuing acts; but *contra* in felony, there must be *adtunc & ibidem* to the stroke, or the robbery, &c. and day and place of assault insufficient. ii. Page 178
- If said that defendant on 1 and 2 of *May* made an assault, and feloniously took, &c. ill, because incertain, to which day felonious taking relates. *ib.*
- Usual to repeat *adtunc & ibidem* to the several parts of fact charged. ii. 178, 180
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- Suff.* in the margin, indictment supposing fact to be done *apud S. in com. præd.* sufficient; but *contra*, if another county be mentioned in the addition of any party, &c. *ib.*
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- So are the words *gladiis, baculis & cultellis*. *ib.*
- Regularly every indictment ought to conclude *contra pacem*, but need not conclude *contra coronam & dignitatem ejus*. ii. 188
- Concluding *contra pacem*, and saith not *domini regis*, is insufficient. *ib.*
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cludes *contra pacem nuper regis, & regis nunc*, good ;
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Where indictments shall conclude *contra formam statuti*,
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Wherein the *civil* and *common law* agree, or differ with
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As to crimes, into what periods *civil law* distinguisheth the
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By common law, as to offenses not capital, in some cases
infant is privileged by his non-age; and herein privilege
is all one, whether above fourteen or under, if he be

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under twenty-one years; but with some and what differences. Page 20

Infant convict of riot, &c, shall be fined and imprisoned, and not be privileged barely because under twenty-one; but court *ex officio* on his trial ought to examine, whether he is *doli capax*, and had discretion to do the *act* where-with he is charged. *ib.*

But if offense charged be a mere non-feasance, (unless of such a thing as he is bound by tenure, or the like to do, as to repair a bridge, &c.) there in some cases he shall be privileged by his non-age, if under twenty-one, tho above fourteen; because *laches* in such case shall not be imputed to him. *ib.*

If infant in *assise* vouch a record, and fail at the day, he shall not be imprisoned; and yet *Westm.* 2. that gives imprisonment in such case, is general. *ib.*

If *A.* kills *B.* and *C.* and *D.* are present, and attach not offender, they shall be fined and imprisoned; but if *C.* within twenty-one, he shall not. 21. ii. 75

Where corporal punishment is but collateral, and not direct intention of proceeding against infant for his misdemeanor, there in many cases infant under twenty-one shall be spared, tho possibly punishment by statute. 21. ii. 75

If infant of eighteen be convict of *disseisin* with force, he shall not be imprisoned, and yet *feme covert* shall. *ib.*

If infant be convict in action of trespass *vi & armis*, the entry shall be *nihil de fine, sed pardonatur, quia infans*; if a *capiatur* be entered, it is error, for it appears judicially, to court, that he was within age, when he appears by guardian, nor shall he be *in misericordia pro falso clamore*. *ib.*

General statutes, that give corporal punishment, extend not to infants. *ib.*

But where a fact is made felony or treason, it extends as well to infants, if above fourteen, as others. 21, 22

Civil law uncertain in defining *etas pubertati proxima*; but laws of *England*, antiently determined it to be twelve years for both sexes; under that age none could regularly be guilty of a capital offense, and above that age he might, or not, according to circumstances, that might induce court or jury to judge him *doli capax, vel incapax*.

22, 23, 24, 515

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Against infant under twelve process of outlawry on indict-

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24, 27, 491, 492

How the law now is with respect to infants and their punishments. 25 to 29

Infant above fourteen and under twenty-one is equally subject to corporal punishments, as well as others of full age, for it is *præsumptio juris*, that after fourteen they are *doli capaces*. 25

A lad of sixteen convict of successive wilful burning three dwelling-houses, &c. had judgment to die, and was executed. *ib.*

Fourteen years common standard, at which both males and females are subject to capital punishments for offenses committed by them at any time after that age. 25, 26, 28

Infant under fourteen, and above twelve, is not *primâ facie* presumed *doli capax*, and therefore regularly for a capital offense committed under fourteen is not to be convicted, but may be found *not guilty*, or jury may find specially, and how; in which case court ought to discharge him, because no felony. 26 to 29

Yet if it appear to the court that he was *doli capax*, when offense committed, he may be convicted and suffer death, tho he hath not attained *annum pubertatis*, viz. fourteen.

26, 434, 569, 570

Infant [ten years old] that had killed his companion, and hid himself, hanged; *malitia supplet ætatem*. 26

A girl of thirteen burnt for petit treason. *ib.*

If infant be above seven, and under twelve, and commit a felony, he is *primâ facie* to be judged *not guilty*, and found so, because supposed not of discretion to judge between good and evil; yet in that case, if it appear by pregnant evidence that he had such discretion, judgment of death may be given against him. 26, 27

Infant of nine killed infant of like age, he confest felony, and on examination found he hid the blood and body; held he ought to be hanged. 27

Circumstances to be inquired of by jury. *ib.*

If convict, court cannot *ex officio* discharge infant. *ib.*

If infant be *infra ætatem infantie*, viz. seven years, he cannot be guilty of felony, whatever circumstances proving discretion may appear, for *ex præsumptione juris* he can-

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As to matters of crime, females have same privilege of non-age, as males. 28

If infant be first arraigned and acquitted on indictment of murder by grand inquest, he may plead that acquittal on arraignment on coroner's inquest, and that will discharge him. 28, 29

Infant under fourteen presumed unable to commit a rape, but present and assisting therein may be a principal. 630

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INFORMATIONS.

11 *H. 7.* gave power to proceed in all penal statutes by information before justices of *assise* and peace, treason, murder, and felony excepted. ii. 151*

Ill use being made of it, repealed. *ib.*

Tho informations are often practised in the crown-office in cases criminal, and by many penal *acts* the prosecution is by the *acts* themselves to be by bill, plaint, information, or indictment, yet prosecution in capital cases is still to be by indictment; except in cases excepted, which see. ii. 156 to 152*

In all criminal causes the most regular and safe way, and most consonant to *magna charta*, is by presentment or indictment, of twelve sworn men. ii. 151*

37 *H. 8.* for curing omission of the words *vi & armis, gladiis, &c.* in indictments, extends not to informations. ii. 187

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By 10 *H.* 7. in *Ireland (Poining's law)* all statutes of *England* are enacted to be observed *there*. 147

25 *E.* 3. declaring treasons, and 1 *H.* 4. enacting, that nothing shall be treason, but what is within that *act*, treasons enacted *there tempore H.* 6. and afterwards before 10 *H.* 7. seem not to be repealed. *ib.*

General introduction of statutes of *England*, being an affirmative law cannot be intended to take away those *acts*, which were made in *Ireland* for declaring treason, as 18 *H.* 6. *ib.*

Act for earl of Strafford's attainder justly repealed, and why. *ib.*

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If jury in case of indictment for *murder* or *manslaughter*, find the *homicide* to have been *involuntary, & sic, &c.* court may give judgment against conclusion of verdict, as that the fact is *manslaughter*, tho verdict conclude *per infortunium*, or *se defendendo*. 471

Where thief is killed of necessity in pursuit, if special matter be found, the killer shall have judgment, *quod eat inde sine die*, because it is no felony, nor causeth any forfeiture, so much as of goods, and so differs from *se defendendo*, or *per infortunium* as to forfeiture of goods. ii. 304

One indicted of *homicide se defendendo*, or *per infortunium* must plead to it, or confess it, and no other judgment, but *remittitur prisonæ*, or he is bailed *ad expectandam gratiam regis*. ii. 395

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- In a *quare impedit* by the *king* issue is joined, and found for defendant, it is alledged in arrest of judgment that no patron is named in the writ, judgment shall be entered generally, *quòd eat inde sine die*, and not specially on plea in abatement; but it shall not bar the *king* in a new action, for the *eat sine die* shall be applied to the plea to the writ. *ib.*
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No other remedy before 11 *H. 6.* & 1 *E. 6.* for judgment to be given on persons reprieved before judgment. 401

Where prisoner hath not always from his arraignment remained in custody of court, where he first had judgment, but is brought in by *cap.* by sheriff, he shall not be estopped from saying *he is another person*, and issue may be taken thereon, and shall be tried before execution awarded; and if he stand *mute*, it shall be enquired *ex officio*, whether of malice. ii. 402, 407

But *contra*, if in custody of same court from his first arraignment, or if he had been bailed, and came in and rendered. *ib.*

Where party outlawed or abjured comes by process into *B. R.* he shall be demanded what he can say why execution should not be awarded on record removed; and if he confess himself *same person*, execution shall be awarded. ii. 402, 407

By 14 *H. 6.* justices of *nisi prius* on transcript of record have power to give judgment and award execution; but then prisoner must be sent by *habeas corpus* to sheriff of county, where *nisi prius* is, or else shall be bailed to appear *there*. ii. 403, 404

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Special provision made for quality of indictors in *Lancashire*. 286. ii. 52*

So in cases of murders, &c. committed in *king's* palace.

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ib.

On summons of a session of the peace, form of precept for return of grand jury; a *scire facias* also issues to all coroners, constables, &c. to be there at that day. 154*

According to others, a *venire facias* issues to summon grand jury. *Vide* the form. *ib.*

On commissions of *oyer* and *terminer*, or *gaol-delivery*, form of like *venire*. *ib.*

On this precept sheriff returns twenty-four or more out of whole county, *viz.* a competent number out of every hundred, out of which grand inquest of sessions of peace, *oyer* and *terminer*, or *gaol-delivery* are taken and sworn *ad inquirendum*, &c. not as antiently in *Eyre*, which was a kind of grand inquest out of every hundred. *ib.*

In some counties which consist of gildable and such franchise, where antiently several justices of *gaol-delivery* sat, as in *Suffolk*, there are two grand juries, one for the gildable, another for the franchise. *ib.*

Indictors to be *probi & legales homines*, and must be so returned; and this holds, as well in coroner's inquests, as other indictments or presentments. ii. 155*, 167

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Who not *probi & legales homines*; where one is not *legalis homo*, tho twelve beside without exception, indictment may be quashed by plea. ii. 155*, 167

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And must be returned by sheriff or bailiffs of franchises, without nomination of any, save by sworn bailiffs. *ib.*

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What freehold indictors ought to have. *ib.*

By statute how justices of *gaol-delivery*, or peace, (one of *quorum*) in open sessions may reform pannel of grand jury. ii. 36, 155*, 156*

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Grand jury sworn first day commonly serves whole sessions of peace, &c. yet court may grant another grand inquest to be returned and sworn, and in what that may be.

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If on record it appear that grand inquest was returned after first day of sessions, unless adjournment be entered on record, it is erroneous. *ib.*

By statute grand inquest may be impannelled to inquire of concealment of another grand inquest, and tho it mentions only a grand inquest to be returned by justices of peace, yet it extends to *B. R.* and possibly to sessions of *oyer* and *terminer*, and *gaol-delivery*; tho that can rarely come in question, because sessions of peace ordinarily accompany those commissions.

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Grand inquest before justices of *gaol-delivery*, &c. ought only to hear evidence for the *king*, and in case of probable evidence ought to find the bill, and why, (*sed quære*) *ib.*

Where they may return the bill *ignoramus*. *ib.*

If it appear that *A.* was killed by *B.* and a bill of murder be presented, regularly they ought to find the bill for murder, and not for manslaughter, &c. and why. 491, 492. ii. 158

If a bill be against one for murder, and grand inquest on evidence before them, or their own knowledge be satisfied, that it is but *per infortunium* or *se defendendo*, and accordingly return bill specially, court may remand them to consider better of it, or hear evidence at the bar, and accordingly direct grand inquest. ii. 158

A judge blamed for fining grand inquest for such a return. *ib.*

If a bill be for murder, and it doth *constare de personâ occidentis*, whether they can find bill for manslaughter, and *ignoramus* for the murder, and whether court be bound to receive such a return. ii. 158 to 162

Whether they can be fined for such a return. *ib.*

If evidence to grand inquest be given at the bar on indictment in *B. R.* and grand inquest will not find a bill according to direction of that court, in what instance they are fineable. *ib.*

If justices of *oyer* and *terminer*, or *gaol-delivery*, having heard evidence at bar, grand inquest will not find according to their directions, justices may bind them over to appear in *B. R.* and on information against them, they may be fined, (*sed quære*) ii. 160

Fines set on them by justices of peace, *oyer* and *terminer*,

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and *gaol-delivery* for concealments or non-presentments in any other manner than that prescribed by 3 H. 7. not warrantably by law. ii. Page 160

Progress of fines set on juries, first on grand inquests, then on petit juries for not finding according to direction of court, and then on jurors, in civil causes for not finding in point of fact according to court's direction. ii. 160, 311

Objections against setting such fines. ii. 160, 161

Grand jury sworn to keep *king's* council undiscovered; disclosing whereof was formerly felony, which is now only fineable. ii. 161

If thirteen or more be of grand inquest, a presentment by less than twelve ought not to be; but if there be twelve assenting, tho some of the rest of their number dissent, it is a good presentment. *ib.*

But on trial by petit jury, it can be by no more or less than twelve, and all assenting to the verdict. *ib.*

If presentment be delivered into a court of sessions and received, no averment lies, that it was not assented to by twelve. ii. 162

Contra, in case of presentment by a leet, for party distrained may so aver. *ib.*

Why indictors presumed to be indifferent. *ib.*

A good exception, that one procured himself to be returned on grand inquest. *ib.*

If bill be for murder, and they return it *billa vera quoad* manslaughter, and *ignoramus quoad* murder, what words it is usual to strike out in presence of grand jury, and so to receive bill. *ib.*

What safest way with respect to this and like cases. *ib.*

Indorsement makes not indictment, but bill affirmed. *ib.*

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Indictment of *aliens* to be by grand inquest of *English*. ii. 271

In what county party indictable. Vide COUNTY.

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By 27 *Eliz.* precedent of *commission to give judgment without trial by jury* *primæ impressionis*. 336

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Jurors triers of credit of witnesses, as well as truth of fact. 635. ii. 295, 276, 277, 313

After *not guilty* received and recorded, sheriff returns pannel of jury. ii. 293

Oath of jury. *ib.*

The form of charge given by clerk to jury; containing the effect of their inquiry. ii. 294

Tho there be twenty prisoners at the bar for several felonies, and the oath is general to try between *king* and prisoner at the bar, yet jury to inquire of no more than what particularly charged with; and tho twenty have pleaded and stand at the bar, when jury is sworn, yet court may stay at any number, and jury stand charged with no more. *ib.*

When they go from the bar, and have brought in their verdict, then if same jury pass on the remaining prisoners, yet they are to be called over again, and reminded of their challenges, and jury sworn *de novo* on their trial. *ib.*

By antient law, if jury sworn had been once particularly charged with a prisoner, it was commonly held they must give up their verdict, and they could not be discharged before. ii. 294

Yet contrary course hath long obtained. ii. 295

Where court may discharge jury sworn, and charged to try one *non compos*. 35

If after jury sworn and departed from bar, one wilfully goes out of Town, the eleven cannot give any verdict without the twelfth; but twelfth shall be fined for his contempt; and that jury may be discharged, and new jury sworn, and new evidence given, and verdict taken of new jury. ii. 295, 296, 309

If a jury be charged with several prisoners, and court finds jury partial to one, court may discharge jury of that prisoner, and put him on his trial by another jury. ii. 296

Twelve sworn to try the issue; after departure *A.* one of them leaves his companions; by consent of all parties *B.* another of the pannel is sworn in *A.*'s place, *A.* returns, and being examined, *why he departed*, answered to *drink*, and denied, on oath, that he had spoken with defendant; whereon *B.* was discharged, and verdict taken of *A.* and the other eleven, and *A.* fined for contempt. *ib.*

If thirteen be sworn by mistake, swearing of last is void, and the other twelve shall serve. *ib.*

No verdict can be taken of less than twelve, and it is error;

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and so in a presentment; but if twelve be recorded sworn, no averment lies that one was unsworn. ii. Page 296
Court at common law may on just cause remove a juror after sworn. *ib.*

When jurors depart from the bar, a bailiff ought to be sworn to keep them together, and not to suffer any to speak with them. ii. 296

After their departure they may hear one of the witnesses again in open court, and may desire to propound a *question* to the court for their satisfaction; and it shall be granted, so it be in open court; but if otherwise, this appearing by examination in court, and indorsed on *postea* will avoid the verdict. ii. 296, 307

If they agree not before departure of justices of *gaol-delivery*, they must be conveyed along in carts, and judge may take and record their verdict in a foreign county; *quare*, whether in such cases, the session may be adjourned before verdict taken. *ib.*

If there be eleven agreed, and but one dissenting, who says he will rather die in prison than consent, yet verdict shall not be taken by eleven, nor refuser fined or imprisoned. *ib.*

For most part in *Eyre* petit jury were all of same hundred where offense done; but now jury that tries, as well as inquires is generally of rest of county. ii. 301

Any of the jury eating or drinking before they have given up their verdict, fineable. ii. 297, 306

But antiently, if at charges of either party, verdict set aside, but not so now. *ib.*

If at charges of prisoner, afterwards found guilty, verdict stands. *ib.*

But if they acquit him, judge before whom verdict given, may record special matter, and thereon verdict shall be set aside, and a new trial granted. *ib.*

A juryman, who hath a piece of evidence in his pocket, and after jury sworn and gone together, shews it to them, is fineable; but verdict not avoided, tho case appears on examination. ii. 306, 307

But if, after jury sworn, either party deliver a piece of evidence to jury, and verdict is given for him, it shall avoid it; but then it must appear by examination, which must be indorsed on *postea* or verdict, so as it appear of record, and not barely by *affidavit* made after; but if verdict be given against him that delivered the evidence, it is good. ii. 307

If a piece of evidence under seal be read in court, jury ought

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regularly to have it with them; but *contra*, if not under seal. ii. Page 307

If after jury sworn, a piece of evidence not under seal be by court delivered to jury, it avoids not the verdict. *ib.*

So if delivered by a mere stranger, if verdict given against him, on whose behalf delivered. *ib.*

If after jury gone from bar, they send for a witness, who repeals his evidence to them, this appearing by examination, and being indorsed on *postea* avoids the verdict; but witness may be heard again in open court, and court or parties re-examine him. ii. 296, 307

If depositions are read in open court to the jury, and as they are going from the bar, solicitor for the *king*, without consent of parties, or order of court delivers copies of them to the jury, if they find against him, on whose part these were delivered, verdict is good; but if for him, and this appears by examination indorsed on *postea*, verdict shall be quashed, and a new *venire* or award for new jury returned. ii. 308

After evidence given, where divers written evidences are read on both sides, and clerk is making up his bundle of evidences under seal to deliver to jury, solicitor for plaintiff delivers a bundle of depositions to jury, some whereof were read, some not, and on examination this appeared, tho jury swore they opened not bundle delivered by solicitor, yet verdict for plaintiff for this cause avoided (matter being indorsed on the record,) and a new *venire* awarded. *ib.*

It might have been a misdemeanor for jury to have looked into bundle delivered by solicitor. *ib.*

If party after jury sworn speak with a jurymen of foreign business, this avoids not verdict after given for him. *ib.*

But if he, or any in his behalf say to a jurymen after his departure from the bar, and before verdict given, *the case is clear for plaintiff*, this shall avoid verdict, if given for him, for it is new evidence. *ib.*

If *A.* be challenged off, and twelve more sworn, yet *A.* goes with them, and is present at their consultation, if *A.* gives no new evidence, nor intermeddles, verdict good, but *A.* shall be fined. ii. 309

If one of the indictors be returned on petit jury, and do not challenge himself, he shall be fined. *ib.*

If a jury say *they are agreed*, and it being asked, who shall say for them, they say *their foreman*, but on further in-

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- quyry they are not agreed, every one of them shall be fined apart. ii. Page 309
- If a juryman be called and refuse to appear, or if having appeared withdraw himself before sworn, fineable. *ib.*
- So if challenged, and while it is trying he withdraw, and challenge be over-ruled, and he be not present to be sworn. *ib.*
- If eleven were agreed, and the twelfth refused, formerly such juryman hath been fined, and inquest taken by the other eleven. *ib.*
- But both these courses now disallowed. *ib.*
- If jury convict against reason and evidence, or without evidence, and against direction of court, court may reprieve convict before judgment, and certify *king* for his pardon. ii. 309, 310
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- By statute justiciar or steward, before whom any one is accused of felony against pregnant evidence in *Wales*, or the *Marches* thereof, may bind over the jurors, &c. *ib.*
- Several instances of jurors finding against evidence, being fined, but not warranted by law. ii. 160, 310 to 314
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- Whether *B. R.* can fine jurors for verdict against evidence. *ib.*
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- Legales*; without any just exception. *ib.*
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- By antient law, if jurors by mistake or partiality give their verdict in court, yet they may rectify it before recorded, or go together again and reconsider it. ii. 299, 300, 310
- If recorded, they cannot retract, or alter it. ii. 300
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JUSTICE OF ASSISE AND NISI PRIUS.

- Justices of assise are to send their records determined into the Exchequer at *Michaelmas*. ii. 31
- By statute *no man of law* shall be justice of assise, where born, or he doth inhabit, but it is usually dispensed with by a *non obstante*. ii. 32

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Whether, by 27 *E. 1. de finibus*, they may deliver gaol without any other commission, and give judgment of felons.

ii. *Pages* 39, 403

Safe to have a special commission for that purpose. ii. 39, 40, 403

In case of counterfeiting coin on 3 *H. 5.* they expressly must have a special commission. ii. 40

If indictment in the country had been removed into *B. R.* and prisoner *there* had pleaded *not guilty*, after 27 *E. 1.* and before 6 *H. 8.* the transcript of record might have been transmitted to have been tried at *nisi prius*, and so in appeal. ii. 39, 403

Naming them justices of *nisi prius* in 27 *E. 1.* is nothing, but the description of their persons, to whom commissions of *gaol-delivery* shall be directed. ii. 40

Justices of *nisi prius* could not at common law give judgment in appeal or indictment sent them out of *B. R.* by *nisi prius* to be tried, no more than in other ordinary civil causes, because they have but transcript of record, and their commission is only *ad triandum exitum*. ii. 403

In appeals, justices of *nisi prius* may inquire of abettors, and give judgment, and if plaintiff nonsuit, arraign prisoner at *king's* suit. ii. 41

May allow clergy to a convict of manslaughter on appeal. *ib.*

May by statute proceed to trial and execution on indictment removed by *certiorari*, and sent down to be tried by them. *ib.*

By 14 *H. 6.* have power in all felonies and treasons to give judgment, and to award execution. 350. ii. 403

This statute gives them no power to inquire of abettors in appeal, nor to arraign on a nonsuit before them at *king's* suit. 350. ii. 403

Justices of *nisi prius*, *nient obstante* 14 *H. 6.* may, in case of indictment or appeal sent them out of *B. R.* return *postea* into *B. R.* and there judgment may be given as at common law. ii. 404

JUSTICE OF PEACE.

They have no jurisdiction in treason, except as a felony [which treason includes,] and as a breach of the peace; they may take examination of traitors, and imprison them, and take information of witnesses, and bind them over, and transmit these examinations and informations to next *gaol-delivery*, &c. 350, 372, 580. ii. 44

They cannot regularly arraign, try, and give judgment in treason, unless in such cases, as are by special *act* com-

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mitted to their cognizance, because their commission extends not to it. *Pages 350, 372. ii. 44*

Per Rolls, C. J. they may take indictment of treason, tho they cannot try it. *372*

By some *acts* may take indictments of particular treasons, but must certify them into *B. R.* or *gaol-delivery*. *ii. 44*

May issue their warrants within precincts of their commission for taking persons charged of crimes within cognizance of sessions, and bind them over to appear there, tho not indicted, notwithstanding lord *Coke's* opinion to the contrary. *579*

Where justice of foreign county may grant his warrant, and commit offender; and where offender taken in a foreign county must be carried before a justice of proper or foreign county, or which of them. *Vide ARREST.*

If *A.* be in commission of peace in proper county, and happen to be in a foreign county, and complaint is made to him of a felony done in proper county, as he cannot issue a warrant to take party, so neither can he imprison in foreign county, because an *act* of jurisdiction; but he may take oath of party robbed in pursuance of *27 Eliz.* or may take examination or information, or recognizance in foreign county (*sed quære* of the last,) but cannot compel them by imprisonment. *581. ii. 50, 51*

One is a justice in two adjacent counties, tho by several commissions, whilst he lives in one county, may send his warrant to arrest in the other. *580*

Convenient, tho not always necessary, to take information on oath; if party suspected, then to set down cause of suspicion. *582*

When necessary or not to bind party to prosecute before warrant issued. *ib.*

Previous to commitment three things required. 1. Examination of party accused, but without oath. 2. Further examination of accusers and witnesses on oath. 3. Binding over prosecutor or witnesses to next assizes, &c. *585. ii. 111*

Examinations ought to be in writing without oath, and returned or certified to next *gaol-delivery*, &c. and being sworn by justice or clerk to be truly taken, may be given in evidence. *585. ii. 52*

If justice at return of warrant cannot take examination; he may *ore tenus* order officer to detain prisoner till next day, and this detainer justifiable without shewing particular cause, or any warrant *in scriptis*. *ib.*

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- If justice commit or bail prisoner, he is to take surety of prosecutor to prosecute, and of witnesses to appear and give evidence, and on refusal may commit them to gaol. 585, 586. ii. 121
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- They (*nient obstante* clause in their commission) are not comprized under name of justices of *oyer and terminer*. 686, 687. ii. 23, 44
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- Where they may or not proceed same sessions against party indicted before them. ii. 26, 29, 48
- They were by statute to send their indictments not determined to justices of *gaol-delivery*, whether felonies or trespasses, if party in gaol or bailed, but now unnecessary. ii. 32, 48
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- General commission of peace in county determines not power
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- Where no words of exclusion, justice of peace of county have
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- King*, notwithstanding charter, may grant commission of
peace specially in that city or county, and they will have
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- But if franchise be granted *ita quod justiciarii comitatûs se*
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- Business of private, *ale-houses, poor, &c.* *ib.*
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- Both to be summoned by precept in *king's* name. *ib.*
- In either of these sessions they may proceed in matters within
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If justice live or be out of his county, he cannot by warrant fetch one out of it into county where he is. *ib.*

Whether a justice, who is such, both in *London* and *Middlesex*, may not commit one in *Middlesex* brought out of *London* and *è converso*. ii. 51

Felony taken in foreign county, justice *there* may commit, examine, give oath to informers, and bind them over to give evidence, or commit them for necessity of preserving the peace; but *quære*, whether such examination and informations be evidence on arraignment of felon in proper county. 305, 306, 586. ii. 51

Tho by custom of *London* justices of *gaol-delivery* sit at *Newgate*, which is in *London*, both for *Middlesex* and *London*, yet justices of peace for *Middlesex* sit only in that county, and justices of peace for *London* there. ii. 51

One is brought by *A.* before justice on suspicion of felony, if *A.* can materially testify, justice may bind him over to prosecute, and if he refuse, may commit him. ii. 52

They have jurisdiction of felonies arising within the *verge*. *ib.*
In their sessions may by common law proceed to outlawry on indictments found before them, and in popular actions by statute. *ib.*

But cannot issue a *capias utlegatum*, but must return record of outlawry in *B. R.* and thence this process shall issue. *ib.*

Where justices may proceed on indictments taken in *Turns* or *Leets* or not. ii. 70, 71

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- quiring it touching whole matter, whereon warrant demanded. ii. *Pages* 110, 111
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- Regularly ought to contain cause. *ib.*
- If general, *to answer such matters as shall be objected*, in discretion of *B. R.* to bail or discharge party. 578. ii. 111
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- Warrant may be in *king's* name with *teste* of the justice, but more usually in name of justice. ii. 113
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- Entry to be *per ostia aperta*; but if doors be shut, and be refused to be opened on demand, officer may break open doors. ii. 114, 116, 117
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- If the goods stolen be not in the house, officer is excused that breaks open the door to search for them on justices warrant; but party that made suggestion punishable, for *in eventu* it is punishable in him. ii. 151
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- If a riot be committed, and rioters dispersed by coming of the justice, and they be suspected probably to meet again, or threaten it, tho constables may *ex officio* suppress the riot, and raise *posse* of vill to it; yet a justice may deliver a special warrant to arrest the rioters, if they re-assemble, tho there be no particular persons named in warrant; he may even authorize them by word. ii. 114, 115

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If one be brought before a justice expressly charged with felony by oath, justice cannot discharge him, but must bail or commit. ii. 121

If charged with suspicion only, yet if no felony proved to be committed, or if fact be no felony, justice may discharge him as to felony; tho if a trespass, he may bind him over for it. ib.

If one be killed by another, tho *per infortunium*, or *se defendendo*, (which is not properly felony,) or in assault on an officer, (which is no felony at all) justice ought not to discharge him, therefore he must be committed, or at least bailed. ib.

They cannot proceed on an indictment taken before superior judges tho otherwise the cause might be within their cognizance. ii. 133

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Where one may justify breaking open doors, or not. Vide ARREST, HUE AND CRY, JUSTICE OF PEACE.

Where one may justify beating a trespasser, come to take his goods, or endeavouring to enter on his possession, or not. Vide HOMICIDE.

KING.

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Tho he is not under the *coercive*, yet in many cases his com-

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Where *B. R.* proceed on offense committed in same county, they may proceed *de die in diem*, fifteen days betwixt *teste* and return of *venire fac.* not required; otherwise if they proceed on a cause removed by *certiorari*, except on indictment taken by justices of peace of county, where *B. R.* sits.

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A. steals horse of *B.* and afterwards delivers it to *C.* who is no party to first stealing, and *C.* rides away with it *animo furandi*, larciny. *ib.*

But if *A.* feloniously take the horse of *B.* and after *C.* steal him from *A.* *C.* is a felon to both, and *C.* may be appealed or indicted as of a felonious taking from *B.* for by the theft *B.* lost not property, nor in law possession of his horse. *ib.*

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Yet it leaves him in same condition, as to any felony at common law, as if he was not excepted. Page 668

And therefore, if my butler or shepherd under eighteen, or if my apprentice take away my goods feloniously, without my actual delivery, tho under value of 40s. he is indictable of felony at common law. 506, 667, 668

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A. delivers the key of his chamber to B. who unlocks the chamber, and takes A.'s goods *animo furandi*, felony. ib.

One that hath a bare charge of goods, tho not possession, may be guilty of felony at common law; as a butler that hath charge of plate, a shepherd of sheep, the like of him that hath a bare special use, as the guest, that hath plate set before him. 506, 667, 668

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Where a man's goods are in such a place, where ordinarily they are, or may lawfully be placed, and a person takes them *animo furandi*, felony. ib.

If a sheep of A. stray from his flock into the flock of B. and B. drives it along with his flock, or by mistake shears it, no felony; but otherwise, if he knows it to be another's, and marks it with his mark, this evidence of felony. 507

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If a guest takes sheets off the bed feloniously, and carry them out of his chamber into the hall, felony. *ib.*

A. came into the dwelling-house of *B.* where nobody was, and broke open a chest, and took out goods to the value of 5*s.* and laid them on the floor, and was taken before he could remove them, he being indicted on 39 *Eliz.* was ousted of clergy. *ib.*

If *A.* hath his keys tied to the strings of his purse, *B.* a cut-purse, takes *A.*'s purse with money in it out of his pocket, but the keys, which were tied to the strings of his purse, hang in his pocket, *A.* takes *B.* with his purse in his hand, but the strings hang to his pocket by the keys, no felony; for *licet cepit, non asportavit.* *ib.*

Where there is a pretense of title, regularly no felony; but yet it may be a trick to colour a felony. 509

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If *A.* takes away goods of *B.* openly (otherwise than by robbery) this evidence only of a trespass. *ib.*

A. leaves his harrow in the field, *B.* having land in the same useth the harrow, and returns it to the place where it was, no felony, but trespass. 509

If *A.* and *B.* being neighbours, and *A.* having a horse on the common, and *B.* having cattle there that he cannot readily find, takes up the horse of *A.* and rides about to find his cattle, and having done turns off the horse again in the common, no felony, but at most a trespass. *ib.*

So if my servant without my privity take my horse, and ride a few miles and return, no felony; but *contra*, if in his journey he sell it. *ib.*

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- Jointenants or tenants in common of a horse, one cannot be a felon to the other. *ib.*
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For mittimus and transcript of record. Vide CERTIORARI, PLEAS.

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If one *ex intentione* do an unlawful act tending to bodily hurt of another, as by striking him, tho not with intent to kill him, but his death happens within year and day, or if he strikes at one, and missing him kills another, whom he did not intend, it is felony and homicide, and not *casually*, or *per infortunium*; so it is, if he do an unlawful act, tho not intending bodily harm of any man, as if he throw a stone at another's horse, and it hits a man and kills him.

39, 440, 472

Want of due diligence and inspection may make that manslaughter, which otherwise would be only chance-medley.

475, 476

Homicide justifiable by statute *de malefactoribus in parvis* not to be committed on any former malice, what required to justify such homicide. 491

In time of peace, if two combat together at barriers, or for trial of skill, if one kill the other, it is homicide; but *contra* if by *king's* command. 44, 473

33 H. 8. as to trial in a foreign county of murder, now in force, the not as to *treason*. 283, 374

Murder and homicide defined. 425, 449, 450, 466

Murdrum, what it antiently imported. 447, 448

Stroke without death, nor death without stroke, or other violence, makes not the homicide. 426

To what intents murder or manslaughter relates to the stroke, or other cause of death, and to what purposes it relates to the death only. 426, 427, 428

If a mortal stroke [before 2 G. 2.] had been given on the *high sea*, and party had come to *England* and died, neither admiral nor common law had jurisdiction. 426

By 2 & 3 E. 6. the justices or coroner of the county where

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MURDER AND MANSLAUGHTER.—*Continued.*

- party dies, shall inquire and proceed, as if stroke had been in same county. *Page 427*
- By same *act* indictment and trial of accessaries shall be in county, where accessory. *ib.*
- No murder till party dies. *ib.*
- If one gives another a stroke, not so mortal, but that with good care he might be cured, if he dies of the wound within year and day, homicide or murder according to the case. 428
- But if it be not mortal, but with ill application party dies, if it appear clearly, that the medicine and not wound was cause of his death not homicide. *ib.*
- If not in itself mortal, if either for want of applications or neglect thereof, it turns to a *gangrene*, or fever, which proves immediate cause of his death, murder, or manslaughter; wound *causa causati*. *ib.*
- One gives a wound to another sick of a disease, which by course of nature might end his life within half a year, it hastens his end by irritating the disease, murder or manslaughter. 428
- If a man by working on the fancy of another, or by harsh usage put another into such a passion of grief or fear, that party dies suddenly, or contracts a mortal disease, tho murder *before God*, yet not so *in foro humano*. 429
- Physician or surgeon gives a potion with a good intent, it kills patient, no homicide; neither if he be no licensed surgeon or physician. 429, 430
- One gives a pregnant woman a potion to destroy the child, it kills her, murder. 429
- Owner of a beast used to hurt people not knowing it, punishable. 430
- Knowing it, and not keeping him up from doing hurt, how punishable. 430, 431
- Tho owner have no notice, if it be a beast *feræ naturæ*, as a lion, &c. if he gets loose and doth harm, owner liable to damages, for he must at his peril keep him up from doing hurt. 430
- If owner, knowing that his ox is used to hurt people, use due diligence to keep him up, yet ox breaks loose, and kills a man, no felony. 431
- If through negligence beast goes abroad after warning of his condition, manslaughter. *ib.*
- If owner purposely let him loose to do mischief, or with a design only to fright people and make sport, and it kills a man, murder. *ib.*

MURDER AND MANSLAUGHTER.—*Continued.*

Laying poison to kill rats, a man casually is poisoned, no felony. Page 431

But if to kill *B.* and *C.* by mistake takes it and is poisoned, murder; so in all cases where malice intended to one *egreditur personam*. 436, 441, 442, 467

The party take poison by the persuasion, but in absence of another, persuader is principal in the murder. 436, 441, 442, 467

A. gives poison to *B.* intending to poison him, *B.* ignorantly gives it to another, who dies of it, murder in *A.* but *B.* not guilty. 436

A. gives purging comfits to *B.* to make sport only, he dies of it, manslaughter. ib.

Various instances of killing, as by exposing sick persons or infants, &c. 431, 432

A man infected with the plague goes abroad with intent to infect another, who is thereby infected and dies, whether murder. 432

If a woman quick with child takes or another gives her a potion to cause abortion, or one strikes her, whereby child within her is killed, it is a great misprision, but no felony; so it is if such child were born alive and baptized, and after die of the stroke given to the mother, not homicide [*sed quære.*] 433

One counsels her before the birth to destroy it, and after child is born, and the woman destroys it accordingly, she guilty of murder and procurer accessory. ib.

Killing one attaint of felony, otherwise than in execution of the sentence by lawful officer is murder, or manslaughter, according to the case. 497

Homicide to kill one outlawed of felony. ib.

Sheriff beheads one condemned to be hanged, murder. 454, 466, 501

5 *Eliz.* makes killing a man attaint in a *præmunire*, murder. ib.

Killing an *alien enemy* murder, unless *flagrante bello*. ib.

If there be an actual forcing a man, as if *A.* by force take the arm of *B.* and the weapon in his hand, and therewith mortally stabs *C.* murder in *A.* but *B.* not guilty. 434

But otherwise of a moral force, as by duress, &c. ib.

If *A.* command *B.* to beat *C.* and he beat him to death, murder in *B.* and in *A.* also, if present; if absent, accessory. 435, 440

A. indicted of murder, and *B.* as accessory *before* by procure-

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MURDER AND MANSLAUGHTER.—*Continued.*

- ment, *A.* is found guilty only of manslaughter, *B.* shall be discharged. Page 437
- All present and assisting to murder, principals. *ib.*
- If *A.* is indicted, as having given mortal stroke, and *B.* and *C.* as present and assisting, and on evidence it appears that *B.* gave the stroke, and *A.* and *C.* were only aiding and assisting, it maintains indictment. 437, 438
- If *A.* lies in wait to kill *B.* and *C.* servant of *A.* being present takes part with his master, and servant or master kills *B.* murder in *A.* only, homicide in *C.* 437
- A.* having malice against *D.* master of *B.* by mistake assaults and kills *B.* the servant, or *B.* comes in aid of his master, and *A.* kills him, murder in *A.* *ib.*
- On indictment of murder, tho party acquit thereof, and convict of manslaughter, he shall receive judgment as if he had been indicted of manslaughter, for offense in substance the same. 499, 450, 466
- If *A.* and *B.* and *C.* and divers others be engaged in an affray together, and *D.* the constable comes to appease it, and *A.* knowing him to be such kills him, and *B.* and *C.* not knowing it comes in, and finding *A.* and *D.* struggling, assist and abet *A.* in killing the constable, murder in *A.* but manslaughter in *B.* and *C.* but others of them, that did not know him, or abet, are *not guilty*. 446
- An abettor of murder and homicide must be present and assisting. *ib.*
- One procuring or abetting and absent, only accessory in murder. 439
- If present, and not aiding and abetting to the felony, neither principal nor accessory, but looking on without using means to take felon, a misprision. 439, 448, 449, 593. ii. 75, 76
- Divers of same party come to make an affray, &c. and come into one house, all are said to be present, tho in another room. 439
- So are they said to be, if they come into one park, tho at a distance from each other. 465
- One ready to aid, tho but a looker on, is a principal. 439, 441
- Divers come with one assent *male faire*, as to rob, kill, beat, or do any trespass, and in doing it one kills a man, all principals. 440, 441, 463
- If *A.* come in company with *B.* to beat *C.* and *B.* beat him till he die, *A.* is a principal. 472
- A.* and *B.* combat, *C.* comes to part them, *A.* kills *C.* murder in *A.* and *per ascuns*, in both; but if falling out on a sud-

MURDER AND MANSLAUGHTER.—*Continued.*

den, then only manslaughter in him that killed him.

Pages 441, 442

A. with above thirty entered with force on a manor-house, and ousted *B.* and his family; twenty others on part of *B.* three days after in the night came with weapons in order to re-enter, and one of them cast fire into a thatcht house adjoining to the house; whereof one in the house shot off a gun and killed one of the party of *B.* manslaughter.

440, 441

A man seisseth goods of an *alien enemy*, and carries them to his house; a stranger under pretence of being deputy-admiral, with a great multitude came with force to the house, and at the gate made assault upon those within, a woman issuing out, without any weapon, was killed by a servant, who came to take the goods, by throwing a stone at another in the gate; *per ascuns*; if the woman came in defense of master of the house, it was murder in vice-admiral and his company; *per auters* no malice against the woman, and murder shall not be extended farther than intended; *per tous*, manslaughter.

441, 442

Divers come to commit a riotous, unlawful *act*, if in pursuit thereof one commit murder or manslaughter, all of that party that committed the disorder are guilty. 442, 443, 463

But in that case it must be intended, when one of same party commits murder, &c. on one of the other party, or on those that come to appease, or part them, or by law to disperse them.

443

A. and *B.* fight upon premeditation, *A.* takes *C.* for his second, *B.* takes *D.* *A.* kills *B.* murder in *C.* formerly held to be murder in *D.* also; but it seems otherwise. 443, 452,

453

If one have no particular malice against any individual man, but comes with a general resolution against all persons, if *act* be unlawful, and death ensue, it is murder; as if it be to commit a riot, or enter into a park. 444, 445, 466

A. and divers others come together to commit a riot, and in their march *A.* meets with *D.* with whom he had a former quarrel, or by reason of some collateral provocation given by *D.* to *A.* *A.* kills him without any abetting by his company, they not principals in the murder or manslaughter.

443, 444

Where many came to commit a disseisin, and one killed, all the company arraigned as principals, and condemned; but it seemeth to be only manslaughter. 444

If many come together on an unlawful design, and one of the

566 TABLE OF THE PRINCIPAL MATTERS

MURDER AND MANSLAUGHTER.—*Continued.*

- company kills one of the adverse party without abetment of the rest to the homicide, none guilty, but those that gave the stroke, or actually abetted. *Page 444*
- Many come to remove a nuisance committed in the highway, they are opposed by divers others, one of the former party strikes one of the latter suddenly, and kills him without abetment of the rest, he who strikes is guilty of manslaughter, rest *not guilty* without abetment. *ib.*
- But if it had been no nuisance, rest had been guilty. 444, 445
- If *A.* hath good title to his house, or be in possession for three years (in which case he may detain by force by 8 *H.* 6.) if any person come to rob or kill him, and he shoot and kill him, no felony, nor forfeits he his goods, as in case of homicide *se defendendo*. 445
- But if *A.* come to enter with force [being ousted,] and in order thereto shoot at his house, and *B.* the possessor having other company in his house shoots and kills *A.* manslaughter in *B.* *ib.*
- In this case, if *B.* shoot out of his house and kill *A.* not felony in the rest of the household; nay, tho he had hired an extraordinary guard (as by law he might,) yet this not manslaughter in the rest of the company, because assembly lawful. *ib.*
- Actual abetting will make the rest principals. *ib.*
- Some present and abetting may be guilty of homicide, and not murder, others of murder. *ib.*
- The master assaults another with malice prepense, servant ignorant of the malice, takes part with master, and kills the other, manslaughter in servant, and murder in master. 446
- Wherein murder and manslaughter differ. 449, 466
- In appeal of murder, whether jury may acquit, or must find party guilty of manslaughter. 449, 450
- What malice constitutes murder. 451
- Malice in fact defined. *ib.*
- The distinction of malice in law into its different kinds. 451, 455
- From what circumstances evidences of malice in fact must arise. 451
- It must be compassing some bodily harm. *ib.*
- A long suit in law not sufficient evidence of malice in fact, but how it may be heightened into malice prepense. 452
- A.* and *B.* are at malice, and reconciled, and after on a new occasion fall out, and one kills the other, not murder; *contra*, if reconciliation counterfeit. *ib.*

MURDER AND MANSLAUGHTER.—*Continued.*

If malice between *A.* and *B.* and they meet and fight, *A.* gives first blow, yet if *B.* kill him (otherwise than in his own defense) it is murder. Page 452

If malice between them, and *A.* assault *B.* and after flies to the wall, and there in his own defense kill *B.* by some it is murder; *sed quære.* *ib.*

A quarrel between *A.* and *B.* *A.* challenges *B.* *B.* declines it, but at length to vindicate his reputation meets and fights, and kills *A.* murder. 452, 453

A. challenges *B.* *B.* declines it, but signifies that he will defend himself, if *B.* going about his occasions is assaulted by *A.* and killed, murder in *A.* but if *B.* had killed *A.* it had been *se defendendo*, if he could not escape, otherwise manslaughter; but if only a disguise, murder. 453

If *A.* and *B.* fall out on a sudden, and presently agree to fight, and each fetcheth a weapon, and goes into the field, and one kills the other, only manslaughter; if they had time to deliberate, murder. *ib.*

The child of *A.* beats child of *B.* who runs home to his father, and he runs three quarters of a mile, beats the other child, and kills him, manslaughter. *ib.*

Keeper of a park finding a boy stealing wood bound him to his horse's tail, and beat him, horse ran away, killed the child, murder. 454

From moderate correction of a servant death casually ensues, homicide *per infortunium.* *ib.*

But if master design immoderate correction, or strike with a lethal weapon, and kills servant, murder; what circumstances considerable in this case. 454, 474

One hath liberty of *insfangthief*, steward gives judgment of death against a prisoner against law, not murder, *quia factum judicialiter, licet ignorantè.* 454

Killing without provocation, murder. 455

Wilfully poisoning implies malice. *ib.*

Killing one come to demand debt, or serve process, murder. *ib.*

A. distorts his mouth, and laughs at *B.* who thereon kills him, murder. *ib.*

A. passing the street, *B.* takes the wall, and thereupon *A.* kills him, murder; but if *B.* had justled *A.* it had been only manslaughter; so if *A.* riding on the road, *B.* whips his horse out of the track, and then *A.* lighting kills *B.* manslaughter. 455, 456

Words no provocation to kill a man, nor will they lessen a

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MURDER AND MANSLAUGHTER.—*Continued.*

crime from murder to manslaughter, except words of menace of bodily harm. Page 456

If *A.* give indecent language to *B.* and *B.* thereon strikes *A.* but not mortally, and then *A.* strikes *B.* again, and then *B.* kills *A.* *by many* only manslaughter. *ib.*

A. sitting in an ale-house, a woman calls him a *Son of a whore*, *A.* at a distance throws a broomstaff at her, and kills her; *quære*, whether murder or manslaughter. *ib.*

The nature of the weapon, wherewith party is killed, considered. 457

A. and *B.* at difference, *A.* bids *B.* take a pin out of his sleeve to take occasion to strike *B.* *B.* doth accordingly, *A.* strikes *B.* whereof he dies, murder. *ib.*

A chiding between husband and wife, thereon he strikes her with a pestle, and kills her, murder. *ib.*

A bailiff comes to execute a process, but hath not a lawful warrant, if such bailiff be killed, only manslaughter. *ib.*

If any minister of justice be killed doing his office, it is murder, tho in the night, or on a Sunday. 457. ii. 85

But if the process be executed out of jurisdiction of the court, only manslaughter; so it is, if court had no jurisdiction of process. 458

Murder to kill an officer, tho he shew not his warrant or mace, where it is not demanded. 458, 462

The bailiff use no words of arrest nor shews his warrant, murder to kill him doing his duty. *ib.*

But if officer doth what is not warrantable, as break open window to arrest, there, if slain, manslaughter only. 458, 474

If he enter by an outward door, he may break open inner door, killing him in such case, murder. 458, 459

Where officers may justify breaking open doors to arrest, and consequently murder to kill them so doing. 459. ii. 94

Where constable acts out of his vill without a special warrant, killing him only manslaughter; but killing a private man in execution of a particular precept from a justice of peace directed to him by name to suppress a riot in the vill of *B.* or to arrest one for some misdemeanor, and within the jurisdiction of the justice, murder; such private man must shew his warrant, or signify the contents. 459

If justices warrant express not the cause sufficiently enough, yet if he had jurisdiction, killing officer in execution of it, murder. 460

Where two constables and their assistants are engaged one

MURDER AND MANSLAUGHTER.—*Continued.*

against another, and party of one constable kills one of the other party, but manslaughter. *Page 460*

Sheriff having a writ of possession against house of *A. A.* gains constable of vill to oppose sheriff, and in conflict constable is killed, not so much as manslaughter; but if any of sheriff's officers are killed, murder. *ib.*

Killing bailiff, constable or watchman doing his duty; murder. *457, 460, 463. ii. 90, 98*

What sufficient notice that a man is a bailiff, constable or watchman, to make it murder. *460 to 464. ii. 90*

What a necessary notification of a man's being a private bailiff. *461*

Rioters assembled in a house, some issue out and kill a constable's assistant within view, murder in those in the house, who abetted the assault. *463, 464*

Killing those, that come voluntarily to a constable's assistance, as well as those that are called, murder. *ib.*

Killing assisting during necessary retreat of constable, murder. *ib.*

On *hue and cry*, tho without justice's warrant, or constable a pursuant is killed by a malefactor, murder; all malefactors in the same field principals; one taken before party hurt, *not guilty*, unless after taken he had animated malefactor to kill the party. *465. ii. 100*

A press-master impressed *B.* and with assistance of *C.* laid hold on him, *D.* finding fault with *C.*'s rudeness a quarrel arose, *D.* killed *C.* but manslaughter. *ib.*

A. comes to rob *B.* and either without, or on resistance, *A.* kills him, murder. *465, 474*

So if men come to steal deer in a park, or rob a warren, and parker or warrener resists, and is killed, murder. *ib.*

If prisoner die by duress of gaoler, murder. *466*

What the form of pardon of murder, what of manslaughter: Where a special *non obstante* of 13 *R. 2.* necessary. *466, 467*

How one indicted of murder having a pardon of felony, or *felonica interfectio* must plead. *467*

1 *Jac.* of *stabbing*, tho temporary, by 17 *Car. 1.* continued till some other *act* should be made to continue, or discontinue it. *468*

Usual to prefer two indictments, one of murder, another on this *act*, and to try that of murder first, convict on either, ousted of clergy. *ib.*

How indictment on this *act* must be to oust clergy; need not conclude *contra formam stat.* good with, or without it. *ib.*

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MURDER AND MANSLAUGHTER.—*Continued.*

- Throwing a hammer and killing a man, not a stabbing or thrusting within this *act*. *Pages 469, 470*
- Stabbing, or thrusting with a sword or pike-staff within it: whether a shot with a pistol, or blow with a sword or staff be within it, *quære*. 470
- A cudgel in the deceased's hands, a weapon drawn within it, *viz.* such as might do hurt. *ib.*
- One within words of the *act*, not within the reason. *ib.*
- If a mason in building voluntarily let fall a stone, and kill another, without due warning, at least manslaughter. 472, 475
- Two playing at cudgels, or wrestling by consent, or playing at foils, one casually kills the other, manslaughter. 472, 473
- If *A.* cut the hedges of *B.* and *B.* beat him, whereof he dies; manslaughter. 473
- Several come to enter *A.*'s house as trespassers, *A.* kills one of them, manslaughter. 474
- If one throws a stone over an house amongst people to do hurt, the intention makes it murder or manslaughter. 475
- Shooting at deer in another's park, *sans licence*, the arrow glauceth and kills, manslaughter. *ib.*
- Throwing a stone with intent to kill another's poultry, and it kills a by-stander, manslaughter. *ib.*
- A.* drives his cart carelessly, and it runs over a child in the street, and yet drives on, and kills the child, murder; but if he saw it not, manslaughter. 476
- One riding in the street whips his horse, and runs over a child and kills him; manslaughter. *ib.*
- But if he rid so in a press of people to do hurt, and horse had killed another, murder. *ib.*
- If there be malice between *A.* and *B.* and they meet and fight upon it, tho *A.* gives first blow, and *B.* retreats as far as he can with safety, yet if *B.* kill him, murder. 479
- A.* assaults *B.* *B.* thereon strikes *A.* without flight, and kills him, manslaughter. *ib.*
- If *A.* upon malice prepenes strikes *B.* and then flies to the wall, and there in his own defense kills *B.* under what circumstances murder, or *se defendendo*. 480
- If a prisoner resists not, but flies, yet officer for fear of a rescue strikes him, whereof he dies, murder. 481
- Bailiff killing a man flying to avoid arrest in a civil action, murder. *ib.*
- If *A.* assaults *B.* first, and *B.* re-assaults *A.* and so fiercely, that *A.* cannot retreat to the wall without danger; nay, tho he fall on the ground upon *B.*'s assault, and then kills *B.*

MURDER AND MANSLAUGHTER.—*Continued.*

it is not *se defendendo*, but murder or homicide according to the case. Page 482

Necessity of flying shall not be taken as a flight, in favour of assailant. 482

A. assaults *B.* *B.* by his own courage and address precludes flight of *A.* then *A.* kills him, manslaughter. 483

Killing on a sudden falling out, manslaughter. *ib.*

A. assaults the master, and servant in defense of him kills *A.* if master not driven to extremity manslaughter in servant. 484

Like law of a master killing in defense of his servant; husband of the wife, the child of the parent, and *è converso. ib.*

If husband or father kill one that attempts to ravish the wife or daughter, if it might have been otherwise prevented, manslaughter. 485

Killing one, who pretending title takes goods as a trespasser, manslaughter. 485, 486

Killing a trespasser in defense of a man's house, manslaughter. 485, 487

Killing adulterer in the act with the wife, manslaughter. *ib.*

A. is suspected by *B.* of felony, tho no felony committed, neither is *A.* indicted, nor probable cause of suspicion, if on offer to arrest him by *B.* he resists or flies, whereby *B.* cannot take him without killing, and *B.* kills him, at least manslaughter; but if a felony committed, and there be cause to suspect *A.* tho innocent, if *B.* kill *A.* in this pursuit, whether it excuse him from manslaughter. 490

If a man have a park within a forest, where he may hunt, and forester kills purloin-man, or his servant hunting in his purloin, murder or manslaughter according to the case. 491

What authority *homicide in execution of justice* requires in the judge that gives, and officer that executes judgment. 497, 498, 499

Giving judgment of death without jurisdiction, if executed, murder. 497

Justice of peace gives judgment in treason, whether murder or misprision only. 497, 498

Where proceeding of judges in capitals without strict extent of their commission, or where their proceeding after their commission is determined, is not murder, but a great misprision. 498, 499

Executing martial law in time of peace, murder. 499, 500

Where the judge hath jurisdiction of the cause, officer executing sentence *not guilty*, tho the judge err; but otherwise, if he hath no jurisdiction. 501

MURDER AND MANSLAUGHTER.—Continued.

If a stranger of his own head execute criminal, murder.

Page 501

If a private kills one suspected on his flight, and refusing to submit, if innocent, at least manslaughter, because innocent man not bound to take notice of private man, as authorized to arrest him.

ii. 82, 83

If one arresting on suspicion break open doors, if party a felon, justifiable; *contra*, if innocent.

ii. 82

If before or after arrest, *B.* an innocent man suspected, draws his sword and assaults *A.* the party suspecting, and *A.* presses upon him to take or detain him, and in conflict *B.* kills *A.* it is murder, or if *A.* kills *B.* it is justifiable.

ii. 83

If one arrested on suspicion kills party arresting, (always supposing party arrested innocent,) only manslaughter.

ii. 84

Bailiff about to take a prisoner, before arrest prisoner draws his sword, and kills him, murder.

ii. 83

If there be a felony done, *A.* suspects *B.* on probable grounds, and acquaints constable with it, and desires his aid to take him, if constable on such arrest or attempt thereof be killed, it is murder.

ii. 92

If there be a warrant against one for trespass, or breach of the peace, and he flies, and will not yield to the arrest, or being taken makes his escape, and officer kills him, murder.

ii. 117

Vide ARREST, CLERGY, HOMICIDE PER TOUT, INDICTMENT. MUTE.

If prisoner prosecuted on 28 *H. 8.* for trial of treason, &c. on the high sea stand mute, he shall have *peine fort & dure*.

ii. 17, 318, 319

Whether *peine fort & dure* be pardoned by general words of all contempts.

ii. 252

In case of demurrer no such judgment can be given.

ii. 257, 315

Where defendant fails in pleading *not guilty*, or putting himself on his country, it is in law a standing mute.

ii. 258

Antiently, if felon peremptorily challenged above thirty-five, he was put to *peine fort & dure*.

ii. 268

If before 22 *H. 8.* felon had pleaded *not guilty*, and put himself on the country, and challenged peremptorily under three juries, whereby jury remained, and a *tales* was granted, and he then stood mute, yet jury past on him on his plea *not guilty*.

ii. 269, 316

MUTE.—*Continued.*

- If prisoner hath pleaded to the country, and when tried says nothing, no penance shall be inflicted, but jury shall be taken. ii. Page 299
- If felon challenge above twenty, challenge only over-ruled, and jurors sworn. ii. 270, 316
- If he hath received his judgment already, or be convict, and brought to the bar, and be demanded what he can say why judgment should not be given against him, or why execution should not be awarded, if he say nothing, it shall not be inquired whether he can speak or not, but he shall have present judgment, or execution. ii. 314, 315
- But if a long time hath passed between his conviction and judgment and this second calling to the bar, it is prudent to inquire by witnesses, whether he can speak. ii. 315
- If one abjure, or be outlawed of felony and return, and be brought to the bar to shew cause, why execution should not be done, if he stand mute, an inquest of office is to be taken, and if it be found that he hath lost his speech by visitation of God since his abjuration, they shall inquire of the identity of the person before judgment or execution shall be awarded; so if he were brought in on a *cap. utlegal.* or *hab. corpus.* *ib.*
- If one indicted or appealed of felony pleads *not guilty*, and puts himself on the country, and jury remains on challenges till another day, and then appear, and prisoner stands mute, yet this not standing mute, for inquest shall be taken on issue already joined. ii. 315, 316
- In that case court having any doubt, hath used to inquire by inquest, sometimes by inquiry *ex officio* by inquest impannelled to try the issue, whether he stands mute of malice, or *ex visitatione Dei.* ii. 315, 316, 321
- When one said to stand mute. ii. 316, 317
- If felon stand mute, court *ex officio* ought to impanel a jury as inquest of office to try, whether it be of malice, or not; and if they find it to be of malice, he shall have judgment of *peine fort & dure*, if otherwise, they are to inquire of all the points material for his defense. ii. 317
- On indictment of treason judgment of treason shall be given against party standing mute. ii. 317
- In treason, tho one standing mute shall be convicted, yet there are some antient instances to the contrary, as on indictment for counterfeiting coin, but now the law is otherwise. 223, 328
- One arraigned for petit treason, challenging above thirty-five

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MUTE.—*Continued.*

shall have judgment of *peine fort & dure*, and how judgment entered. *Pages 382. ii. 268, 399, 400*

In appeal, if appellee stand mute, judgment of penance shall be given. *ii. 317, 321, 322*

One arraigned before lord steward on 33 *H. 8.* and standing mute, shall have judgment, as if convicted. *ii. 318*

Peer arraigned on indictment of felony before his peers refusing to plead, shall have this judgment. *ib.*

A woman shall have same judgment, if she stand mute. *ib.*

One indicted of petit larciny refusing to plead shall have the same. *ii. 320*

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ii. 252

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ib.

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ib.

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ii. 195

25 E. 3. an impracticable law.

ib.

But by 8 H. 6. in indictments or appeals of treason, or any felony or trespass against one of another county, after one *cap.* a second *cap.* with *proclamations*, and how returnable, shall be granted to sheriff of that county, wherein he is supposed to be conversant, before *exigent* shall issue.

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But if party were conversant in county, where indicted, at time of felony or treason committed, process to be at common law.

ib.

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ii. 195

By 10 H. 6. same process [as by 8 H. 6.] directed on indictment of felony or treason removed into *B. R.* by *certiorari*, or into any other courts.

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These *acts* of little effect; for if party was conversant in county, where fact committed, (as he cannot be otherwise) then he may be named of that place in indictment, and process is to go as at common law before these *acts*; and this is now the usual course.

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If *J. S.* be indicted in county of *B.* for a felony there committed, and indictment runs *J. S. nuper de A. in com. B. alias dict. J. S. nuper de D. in com. S.* there shall no process go to sheriff of *S.* because that addition is only in the *alias dictus*, and therefore process shall only issue in county of *B.* and same law in appeal.

ib.

If it runs *J. S. de A. in com. B. nuper de C. in com. D. cap.* shall issue only *in com. B.* but if it runs, *J. S. nuper de A. in com. B. nuper de C. in com. D. a cap.* shall only go into the county of *B.* where he is indicted, but on return thereof, (if it be before commissioners) a *cap.* with proclamations shall issue to sheriff of *D.* and if in *B. R.* on an indictment found there, one *cap.* to one sheriff, and another to the other sheriff, according to 6, 8 & 10 *H. 6.*

ib.

If one be indicted by name of *J. S. nuper de A. in com. Cestrie*, the second *cap.* with proclamation shall be awarded to the *prince*, or his lieutenant, and the like to bishop of *Durham*, or chancellor of *Lancaster*.

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ii. 197

Tho' this be marked as an obsolete statute, no *act* repeals it, save implication of 16 *C. 1.* which it seems not to do.

ib.

Yet never put in ure.

ii. 198

B. R. either on indictment taken before them, or removed thither by *certiorari*, may issue *cap.* and *exigent* into any county in *England* on a *non est inventus* returned by sheriff of county, where party indicted, and a *testatum* that he is in some other county.

ib.

In appeal by writ against principal and accessory, which is general till declaration, plaintiff must at his peril distinguish the process, for if he take his *exigent* against all, he must count against all his principals.

ii. 200

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But in appeal by bill or indictment, *cap.* is against them all but when it comes to the *exigent*, it shall issue only against principal, and process be continued by *cap.* infinite against accessory till principal be outlawed, and then *exigent* shall issue against accessory. ii. Page 200

If accessory appear on *cap.* he shall not be let to bail, and have *idem dies* by bail till process be determined against principal. *ib.*

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ii. 205

If party render himself after *exigent* awarded, and plead to indictment, and is found *not guilty*, forfeiture by *exigent* stands.

ib.

Necessary for party outlawed in felony to bring his writ of error specially, *iam in adjudicatione brevis de exegi facias, quàm in promulgatione utlegariæ*.

ib.

Error in *exigent* cause to reverse outlawry, and error in appeal or indictment, on which *exigent* is awarded, is cause to reverse both outlawry and *exigent*.

ib.

Without judgment of reversal in a writ of error forfeiture by *exigent* awarded stands, tho indictment quashed, or appeal abated.

ib.

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ii. 206

But bare judgment of outlawry without return of record is no attainder, nor gives any escheat.

ib.

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ib.

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ib.

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ib.

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Where a wrong person brings an appeal, *auterfoits acquit* is no plea, neither is it a bar to the *king*, but he may be indicted *nient obstante* that acquittal; and if right heir bring a new appeal, and be nonsuit, he may be arraigned on that appeal at *king's* suit. ii. 249

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If one had been convict of any-one felony, and prayed his clergy, and read, and had been delivered to the ordinary, formerly he should never have been arraigned for any of the former felonies. *ib.*

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He must either shew record *sub pede sigilli*, or have record removed into court, where it is pleaded, by *certiorari*, or if it be record of same court, must vouch term, year and roll, for record is part of his plea. *ib.*

He must make averments, as case shall require, that he is same person, and it same offense. *ib.*

No issue shall be taken on plea of *nul tiel record*, because pleaded in court, but *king's* attorney may have *oyer* of record. *ib.*

The averments are issuable. *ib.*

If issue taken on them, they shall be tried by jury, that is returned to try prisoner, by 22 *H.* 8. *ib.*

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What *beyond seas*, and what *within king's dominions*, *quoad* this *act*. *ib.*

Having two wives, one of which is divorced *a mensâ & thoro* not within it; if divorced *causâ sævitæ*, whether within it. 694

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If servant or wife be of confederacy to kill the husband or master, and be in same house where he is killed, tho not in same room, they are principals, and guilty of petit treason, for it is a presence; and so in other cases. 379, 439

There are principals and accessaries both *before* and *after* in petit treason. 381

If one take poison by persuasion, but in absence of another, and die of it, persuader is principal in murder. 431

Counselling, commanding, or directing killing a man, if he that counsels, &c. be absent, makes him accessary *before* to the murder. 435

In case of poisoning, he that counsels another to give poison, if he doth it, he, who counsels it, if absent, but accessary *before.* 435, 615

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He, who lays, or gives poison, tho absent when taken, is a principal. *Pages 435, 615*

If *A.* command *B.* to beat *C.* and he beat him to death, murder in *B.* and if *A.* be present, murder in him also; if absent, he is accessary. *ib.*

If *A.* counsels *B.* to poison his wife, *B.* obtains poison from *A.* and gives it to his wife, who ignorantly gives it to a child, this is murder in *B.* but *A.* who was absent, is not accessary to the murder, because the command shall be construed strictly. *436*

If *A.* counsel *B.* to beat *C.* with a small wand, if *B.* beat him to death with a great club, *A.* is not accessary. *ib.*

If *A.* counsel *B.* to kill *C.* and before the fact done countermands it, if *B.* does it afterwards, it is murder in *B.* but *A.* not accessary. *436, 452*

In manslaughter there can be no accessaries *before*, nor in homicide *se defendendo*. *437, 450*

If *A.* be indicted of murder, and *B.* as accessary *before* by procurement, and *A.* be found guilty only of manslaughter, *B.* shall be discharged. *ib.*

All present and assisting to murder, principals. *ib.*

In *burglary* or robbery, those who watch at lane's end, &c. tho not actually present, burglars, or robbers. *439, 534, 537, 555, 563*

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Persons ready to aid, tho but lookers on, principals. *ib.*

Divers come with one assent to do mischief, as to kill, rob, beat, &c. and in execution thereof one commits murder, all principals. *440, 441*

Divers aiming to rob a person charge him with felony, one robs him, robbery in all; but without such intent, rest not guilty. *ib.*

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- In treason, whether principal in first degree shall be tried before those in second degree. 613. ii. 223
- In cases criminal, not capital, no accessaries. 530, 613, 616, 618
- Accessaries *after* to crimes not capital by receiving offenders cannot be in law under any penalties as accessaries, unless the *acts* inducing the penalties extend to receivers, or comforters, as some do. 613
- Maintainers in certain *acts* denote maintainers of offense, and not parties. *ib.*
- Where an *act* makes a felony, it incidently makes such accessaries as would be accessaries *before* or *after* to a felony at common law, but the special penning sometimes varies the case. 613, 614, 615, 632
- But if the *act* express accessaries *before* and not *after*, there can be no accessaries *after*. 614
- Accessaries *after* an offense of a lower degree than accessaries *before*. 614, 615
- Procurers, counsellors and abettors import accessaries *before*. 614
- Receivers or comforters accessaries *after*. *ib.*
- In offenses unpremeditated no accessaries *before*, as *per infortunium*, &c. 615, 616
- Words of bare permission make not an accessary. 616
- All present, when poison infused, principals; but hiring another to do it, without being present, makes him only accessary. *ib.*
- Buying materials of poison makes party only accessary. *ib.*
- Where the execution varies from the command in person slain, or in nature of offense, commander is not accessary; *contra*, where offense is only varied in degree. 617
- A.* gets *B.* with child, and before the birth counsels *B.* to kill it, child is born, *B.* murders it, *A.* accessary. *ib.*
- Where the instrument, as a madman, or wild beast cannot be a principal, party, tho absent, is principal. *ib.*
- A.* commands *B.* to kill *C.* and before the fact repents and countermands it, yet *B.* kills him, *A.* not accessary; *contra*, if he had not countermanded it. 618

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A. knows *B.* hath committed a felony, but conceals it, not felony, but misprision. *Page* 618

A. sees *B.* commit a felony, but consents not, nor takes care to apprehend him, not accessory, but finable. *ib.*

A. knowingly suffers a felon in his house to escape before arrest, not accessory; but *contra*, if corrupted by money. 619

So if he shut fore-door, and deceive pursuers, this being an *act*, and not bare omission, he is accessory. *ib.*

A. hath his goods stolen by *B.* if *A.* receives his goods without any contract to favour him, it is lawful; but otherwise theft-bote, but yet *A.* not accessory. *ib.*

Where receipt of stolen goods [before 3 & 4 *W. & M.* &c.] made an accessory, or not. 619, 620. ii. 150

Relieving a traitor or felon in prison or bailed out, makes not an accessory. 620, 621

Conveying instruments to a felon to break prison, or bribing gaoler to suffer an escape makes an accessory. 621

Writing in favour of a felon for his deliverance, or instructing him to read to save him by his clergy makes not party an accessory. *ib.*

If *A.* be committed for felony, and *B.* an attorney, advise the friends of *A.* to write to the witnesses not to appear against him, who writes accordingly, this makes neither *B.* nor the friends accessory, but punishable, and how. *ib.*

A husband receiving the wife may be an accessory, but not wife for receiving the husband. *ib.*

If the wife alone, without his privity, receive a felon, she only accessory. *ib.*

If they jointly receive a felon, it is only the act of the husband. *ib.*

Accessory cannot be, unless felony committed; *A.* wounds *B.* dangerously, *C.* receives *A.* then dies, *C.* not accessory. 622

One may be accessory to an accessory by receiving him, knowing him to be an accessory to felony. *ib.*

No accessory in receipt of a felon, without knowing that the party hath committed a felony. *ib.*

Accessory may be indicted with principal, or severally. 623. ii. 223

An accessory *before* or *after* in another county, than where principal felony committed, dispunishable at common law. *ib.*

By 2 & 3 *E.* 6. accessory indictable in county where acces-

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sary, and to be tried there; this *act* gives no power to justices of peace. Page 623. ii. 44

Justices before whom foreign accessory is, shall write to those before whom principal is attaint, for record of attainder, and how the writ is to be. 623

Process of outlawry must stay against accessory till principal attaint. 623. ii. 200

Accessory shall not answer till principal be tried, but otherwise, if he will wave benefit of the law. *ib.*

But if he wave it, necessary to respite judgment till principal be convict and attaint, for if principal be after acquit, conviction of accessory annulled; but if acquit of the accessory, acquittal good. 624. ii. 224

If he be indicted as accessory to three, he shall not be arraigned till all the principals be attaint or outlawed; but if he be indicted as accessory to one of them only, if that one be attaint, tho the others be not, he shall be arraigned. 624. ii. 200, 201

But the court may, if he be indicted as accessory to three, arraign him only as accessory to the party attaint, and if acquit of that, he may be arraigned *de novo* as accessory to the other two. *ib.*

Best to respite arraignment of accessory till all principals appear, or be outlawed. *ib.*

If principal and accessory appear, and plead together, they may be tried by same inquest; but principal must be first convict and attaint, and how jury to be charged. 624. ii. 223

If principal plead in bar, or abatement, accessory not to answer till plea determined; if plea maintained, accessory discharged, if overruled, principal shall plead over to felony, and may be acquitted. *ib.*

If *A.* be attaint of murder on an appeal, and then *A.* is indicted of murder as principal, and *B.* as accessory, principal pleads former attainder, *B.* shall not be put to answer as accessory, because he is not attaint upon same suit; and so it is, if attainder of *A.* were first on the appeal. 625

If principal was acquit, or convict, and had his clergy, a pardon, &c. accessory should not [before 1 *Annæ*] have been arraigned; *contra*, if after attainder. 598, 625

If principal be erroneously attaint, accessory shall be arraigned, but principal reversing his attainder, reverseth also attainder of accessory. 625

One acquit as principal cannot be indicted as accessory

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before, but acquit as accessary *before* or *after* may be arraigned as principal. *Pages* 625, 626. ii. 244

But one acquit as principal or accessary *before* may be indicted as accessary *after*. 626. ii. 244

Accessary to crimes within 28 *H. 8. of trial of treasons, &c. upon the high sea*, not punishable thereby, but by the *marine law*. ii. 17, 18

Principal in murder in second degree, may be arraigned and tried before principal in first degree. 437. ii. 223

Lately accessary, if he appear, hath been arraigned and put to plead, but process against inquest and trial ceaseth, till principal come in, or be attaint by outlawry. ii. 224

Accessary may pray process against principal, and therefore, if accessary acquitted before principal tried, it is a good acquittal; and if convict, a good conviction; but no judgment shall be given on conviction, till principal tried. *ib.*

If *A.* be arrested, or in prison for felony, and *B.* rescue him, or the goaler suffer a voluntary escape, tho they may be presently indicted; yet they shall not be arraigned till *A.* be convict, or attaint by judgment, or outlawed; for if *A.* be acquitted on the indictment, the rescuer, or gaoler shall be discharged. 237, 238, 591, 598. ii. 224

How far a wife may be accessary to her husband's treason, or felony. Vide COVERTURE.

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Regularly no process issues in *king's* name to take a felon, unless on indictment, or matter of record in court. 575, 576. ii. 113

Of the writ *de securitate pacis*. 51, 52

In all cases *king's* writs directed to sheriff, which he executes *per se*, or by his warrant to his bailiffs. 577

Sheriffs or bailiffs may require any one to assist in the execution. *ib.*

If above two coroners in a county, and a writ is directed *coronatoribus*, tho one dies, whilst plural number remains, a return by the coroners is good; but if only one survivor, he cannot execute and return it till another made. ii. 56

But if two coroners in a county, or more, one may execute the writ, as in case of an *exigent*, but return must be in name of *coronatores*. *ib.*

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But if only a coroner of a franchise, whether he may make precept to sheriff to attach him. *ib.*

He cannot make precept to bailiff of a franchise, because bailiff of a franchise cannot execute process within it but by sheriff's mandate. *ib.*

Process after indictment issued from a sessions of the peace is always in *king's* name. ii. 113

On indictment or information preferred on a penal law, *capias* not first process, but *venire fac.* and *distringas*, and in cases of information no process of outlawry at all till 21 *Jac.* ii. 113

Supersedeas on a prohibition issues from *chancery* in vacation, from *B. R.* in term. ii. 147

Of the writ *de odio & atia*; its different names. ii. 148

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Party to be bailed by twelve persons. *ib.*

The indictments be not discontinued by demise of the *king*; in some cases process are. ii. 189, 209

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All process on an indictment, and generally all process for the *king* are with a *non omittas, &c.* 577. ii. 224

By virtue thereof sheriff may enter into any liberty to execute the same. ii. 224

If party be in his own house, or in the house of another, and doors be shut, and sheriff having given notice of his process demand admittance, and the doors be not opened, he may break open the doors, and enter to take the offender. *ib.*

For jury process. Vide TRIAL.

For process in outlawry. Vide OUTLAWRY.

For warrants. Vide ARREST, JUSTICES OF PEACE.

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PROPERTY.

One hath a property *ratione loci privilegii & impotentia*, in young beasts and birds *feræ naturæ* in his park. 511

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Who shall be said a queen within 35 E. 3 de prodicionibus.

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Debet esse penetratio, as well as *emissio*. 628

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Keeping a woman as concubine before the rape, antiently a good exception, and now may be evidence of assent. ib.

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acquittal into the court, that so he may form his plea upon it, for record is part of his plea. ii. Page 142

Plea must set forth record in certain; how it is to conclude. *ib.*

Record must be removed by writ, for the *B. R.* may take an indictment, or other record of justices of peace *proprieis manibus*, where it is to be proceeded on for the king, yet they cannot take record of acquittal to serve prisoner's plea without writ. ii. 142

If one pleads *auterfoits acquit de mesme felony*, and vouch the record, court may examine proof, that it is same felony, and thereon allow it, without any confession by king's attorney; but what the safest methods. ii. 242, 243

Plea allowed by testimony of justices of peace before whom he was acquit. ii. 243

If prisoner be arraigned before justices of *gaol-delivery* in the country, and plead *auterfoits acquit* of same felony before same justices in that county, or other justices of same county that were before them, or in *B. R.* how plea to conclude. *ib.*

Of what averment matter of fact of the plea consists. *ib.*

There must not only be acquittal by verdict, but a judgment thereon, *quodd eat indè sine die*, and pleaded also. *ib.*

Acquittal regularly a warrant for entering of judgment at any time after. *ib.*

One may plead *auterfoits acquit* notwithstanding variance in the times alledged in first and second indictment, and aver it to be same felony. ii. 244

If one be indicted for murder of *J. S.* and acquitted, and after indicted for murder of *J. N.* yet he may plead *auterfoits acquit*, and aver it to be the same man, & *que conus per l'un nosme & l'autre*. ii. 244, 245

Where there is a different vill laid in the first and second indictment, he may plead *auterfoits acquit*, and aver it to be same vill, but *contra*, where party indicted, first in one county, and then in another, but said to be otherwise in an appeal. ii. 245

If one commit a robbery in one county, and carry the goods into another, and is indicted of larciny in foreign county, and is there acquitted of the larciny, it is no bar to indictment of robbery in proper county, because another offense. ii. 245

Neither is it a bar to indictment of larciny in proper county. *ib.*

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Burglary committed, and goods stolen, if indicted of larciny for goods stolen and acquitted, yet he may be indicted for burglary, and *à converso*. ii. Pages 245, 246

One acquitted for stealing the horse, may be arraigned and convict for stealing the saddle, tho both done at same time. ii. 246

Aquittal of murder a good plea to indictment of manslaughter, or *à converso*, so acquittal of murder a good bar to indictment of petit treason, and *à converso*. ii. 246, 252

It must be acquittal on trial either by verdict, or battle. *ib.*
Party acquitted by misdirection of judge, may plead it. ii. 247

Special verdict found in felony, and court erroneously adjudge it no felony, as long as that judgment remains unrevers, if prisoner be indicted *de novo*; he may plead *auterfoits acquit*. ii. 247, 248

If judgment revers, party may be indicted *de novo*; but *quære*, whether in point of the verdict party shall not be executed. ii. 247

If at common law one had been suspected of murder, and arraigned within the year and acquitted, tho arraignment should not have been, yet it stood as a good acquittal pleadable to another indictment, or appeal. ii. 247, 249

Auterfoits acquit no plea, where indictment insufficient, or contains no felony. ii. 247, 248

One must be *legitimo modo acquietatus*. ii. 248

If error only in process in appeal, or indictment, and yet prisoner appear and plead *not guilty*, and be acquit, this acquittal pleadable. ii. 248

One attain on insufficient indictment shall not be arraigned on new indictment for same offense, unless former judgment first revers. *ib.*

Where a wrong person brings an appeal, *auterfoits acquit* is no plea, neither is it a bar to the *king*, but he may be indicted *nient obstante* that acquittal; and if right heir bring a new appeal, and be nonsuit, he may be arraigned on that appeal at *king's* suit. ii. 249

If defendant be acquit on appeal of murder, or robbery by verdict, regularly a good bar to indictment. *ib.*

Acquittal by battle on an appeal no bar to indictment for same offense. *ib.*

Indictment and conviction of felony without judgment of death, or prayer of clergy, no bar of a new indictment,

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- nor is *auterfoits acquit* by verdict, unless judgment given. ii. *Pages* 248, 251
- Auterfoits convict and clergy had* a good bar to indictment or appeal for same crime. ii. 220, 250, 251
- And so it is if he pray his clergy, and court advise upon it, tho clergy not actually allowed. ii. 251, 390
- Auterfoits attaint de mesme felony*, tho on insufficient indictment, was at common law a bar to appeals, as well as indictments of same offense, and so remains, except in appeals of death. ii. 251
- If *A.* be indicted of piracy, and hath judgment of *peine fort & dure*, and by a general pardon piracies are excepted, but judgment of *peine fort & dure* is pardoned by general words of all contempts, *quære*, whether, if he may be arraigned for same piracy, but he may be arraigned of any other piracy committed before that award. ii. 252
- If *A.* be attaint of treason, &c. by outlawry, he shall not be indicted or appealed of same felony till outlawry reversed. *ib.*
- One indicted at common law of felony, and having judgment of death, yet may *nient obstante* his attainder, be arraigned for treason committed before the felony, but *quære* as to treason committed after it. *ib.*
- Where one is appealed of robberies committed on divers persons and they bring several appeals, and he is attaint at suit of one, yet he shall be put to answer to appeals of the others. *ib.*
- If there be an indictment and attainder at the prosecution of one, *quære*, whether after he may not be arraigned on an indictment at prosecution of another to have restitution on the statute. 545. ii. 252
- One commits several felonies, and is attaint of one, and *king* pardons that attainder and the felony for which he was attaint, if after indicted or appealed for same felony, he may plead his attainder, and no good replication to say, he was pardoned after. ii. 253
- But yet may be indicted or appealed for the other felonies; and if he plead his former attainder, it may be replied that he was pardoned after, whereby he is restored to be a person able to answer those offenses. *ib.*
- If one attaint commit a felony after, and be pardoned the first felony and attainder, he shall be put to answer the new felony. *ib.*
- If one commit several felonies, and be convict of one, but no

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judgment of death, nor clergy given him, he may be indicted for all the former felonies. ii. *Page* 253

If one had been convict of any-one felony, and prayed his clergy, and read, and had been delivered to the ordinary, formerly he should never have been arraigned for any of the former felonies. *ib.*

For any felony done after conviction, and clergy allowed, he may be indicted; but not if he stand attaint and unpardoned. *ib.*

Now by statute clergy dischargeth all offenses precedent within clergy, but not such other offenses as are ousted of it. ii. 254

Accessory on arraignment may plead acquittal of principal. *ib.*

Gaoler arraigned for voluntary escape of a prisoner for felony may plead acquittal of felon of principal felony, and so may rescuer arraigned on indictment for rescue of a felon. 611, 612. ii. 254

Felon acquitted of first felony shall not be arraigned of breach of prison, or if indicted of it before acquittal, and then is acquitted of principal felony, he may plead it in bar to indictment for breach of prison. 611, 612. ii. 224, 254, 255

He who pleads *auterfois acquit, convict or attaint* must plead it specially setting forth record. ii. 255

He must either shew record *sub pede sigilli*, or have record removed into court, where it is pleaded, by *certiorari*, or if it be record of same court, must vouch term, year and roll, for record is part of his plea. *ib.*

He must make averments, as case shall require, that he is same person, and it same offense. *ib.*

No issue shall be taken on plea of *nul tiel record*, because pleaded in court, but *king's* attorney may have *oyer* of record. *ib.*

The averments are issuable. *ib.*

If issue taken on them, they shall be tried by jury, that is returned to try prisoner, by 22 *H. 8.* *ib.*

He that pleads these pleas, must plead over *not guilty* to the felony, for if the pleas be adjudged against him, yet he shall be tried on *not guilty.* ii. 255, 256

Where one may plead to jurisdiction of court without answering to the felony. ii. 256

If one by plea confess the fact, he need not answer to the felony, but he may in that case, if he will, plead over to the felony. *ib.*

If one be indicted or appealed of felony, and he will demur

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bulls, &c. as executors thereof, treason as well in ecclesiastics as laymen. Page 643

By 35 *Eliz.* penalty of *dissuading from church, holding of conventicles.* 688, 689, 690

Non-conformity within three months after conviction, party shall abjure the realm. *ib.*

Not departing, or returning, felony without clergy. *ib.*

Submitting discharged of the penalty of this *act.* *ib.*

Relapsing loseth benefit of the submission. *ib.*

Penalty for *retaining or relieving recusant after notice.* *ib.*

Exposition on this *act.* *ib.*

Circumstances necessary to be alleged and proved. *ib.*

By 35 *Eliz.* *popish recusant refusing to abjure, or after abjuration to depart* felony without clergy. 690

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By 1 *Eliz.* against *maintaining any foreign ecclesiastical authority within these realms*, first offense forfeiture of goods, &c. second incurs penalty of *præmunire*, third treason. 329, 330

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By 5 *Eliz.* *maintaining the authority of the pope made a præmunire* the first time. *ib.*

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By 23 *Eliz.* *reconciling or being reconciled to the popish religion*, where made treason; how enlarged by 3 *Jac.*

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What the religion established within 23 *Eliz.* 333

Aiders and maintainers of offenders within 23 *Eliz.* and concealers of such offenses, how punished. 333

By 27 *Eliz.* where a *subject, not being a jesuit, educated in a foreign seminary, and not returning after proclamation, or a popish priest coming into the realm* shall be guilty of treason. 336

Receiving of such popish priest knowingly, felony *sans* clergy. 336, 615, 688

Sending relief to a seminary, a præmunire. 336

Concealers of such priests, how punished. 337

Justice of peace, to whom discovery made, not informing one of the privy council, &c. shall forfeit 200 marks. *ib.*

25 *Eliz.* a *suspected jesuit or priest, refusing to answer directly*, to be imprisoned, till he shall make direct answer. *ib.*

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RESCUE.

Rescue of one taken on general warrant to answer what shall be objected, no cause being exprest, not felony. *Page* 578, 609

He who rescues a felon, may be indicted, but shall not be arraigned till principal be convict or attaint. 598, 607. ii. 254

Rescuer is *quasi* accessory, if principal be convict and not attaint, but hath his clergy, or be acquitted, rescuer shall not be put to answer the rescue, but be discharged. ii. 254

If principal be found *not guilty*, or guilty of a crime not capital, rescuer ought to be discharged, but he may be fined for the rescue. 599. ii. 254

Tho prisoner indicted of several felonies, yet the rescue makes but one. 599

A man arrested on *mesne* process in carrying to gaol is rescued, the return of the rescue excuseth the sheriff; *contra* of an execution. 601, 602

If a felon be attaint and carried to execution, and be rescued from the sheriff, sheriff is punishable, because he should have taken sufficient power with him. 602

Hinderance of arrest of felon misdemeanor, but no felony. 606

Where arrest of a felon lawful, rescue of him, felony. *ib.*

If in custody of a private man, notice that he is arrested for felony necessary to make it felony; *contra*, if in custody of an officer. *ib.*

Return of rescue of a felon against *A.* by sheriff not sufficient to put him to answer to it without indictment. *ib.*

If prisoner under custody be rescued or prison broke by strangers without his procurement, no felony in the prisoner, but felony in the strangers as a rescue; but if by his procurement, felony in him as a breach of prison. *ib.*

If party rescued be imprisoned for felony, and be rescued before indictment, what indictment must surmise; but if party be indicted and taken by a *cap.* and rescued, then there need only a recital that he was indicted *prout*, and taken and rescued. 607

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RESTITUTION.

The several means of restitution of goods to party, from whom stolen. 538

On appeal of robbery, &c. and conviction thereon, goods contained in appeal were to be restored to appellant. 538, 539

If he omit any in his appeal, they are confiscate. 538, 545

If party brings appeal of robbery, &c. and it appears appellee came to the goods by bailment, &c. without felony, plaintiff forfeits his goods to the *king* for his false appeal. 539

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Where one steals goods of divers men severally, and one of them convicts offender on his appeal, before judgment rest may pursue their appeals. Page 539

If judgment be given against *A.* on the appeal of *B.* yet if appeal of *C.* were begun before the attainder, *A.* shall be arraigned on appeal of *C.* because he is to have restitution of his goods thereby; second trial at suit of *C.* only in nature of an inquest of office to intitle him to restitution; whether the attainder be a bar to *C.* *ib.*

But if *C.* doth not commence his appeal before *A.* is attaint, *A.* shall not be arraigned thereon; but if afterwards pardoned, he shall be arraigned at suit of *C.* but *contra*, if attainder were at *king's* suit. *ib.*

Where appellant shall have restitution. 540

When he shall have restitution. 540, 541

Of what things he shall have restitution. 541

If felon waive goods stolen without any pursuit after him, they are not in law *bona waviatia*, nor forfeit; but *contra*, if he waive them on pursuit. *ib.*

This forfeiture not like a stray, where the lord may seize, yet owner may retake it within year and day; but here true owner cannot seize his own goods, tho' on fresh suit within year and day, which is an expedient in the law to compel owner to prosecute his appeal. *ib.*

Of what things owner shall have restitution on 21 *H.* 8. he should have had restitution of on conviction in appeal at common law. *ib.*

Before this *act* no restitution on indictment. 542

This *act* speaking of *king's* subjects extends to aliens robbed. *ib.*

If servant be robbed of master's money, and master or servant by procurement give evidence, and convict felon, master shall have a writ of restitution. *ib.*

Restitution to be to party robbed, or owner. *ib.*

If *A.* be robbed by *B.* and *C.* and *B.* only is convict of robbery by evidence of *A.* he shall have restitution. *ib.*

If *A.* be robbed of an ox by *B.* who sells him to *C.* who keeps the money in his hands, and after kills the ox and sells it, or if the money be seized in the hands of the thief, *A.* may have a writ of restitution for the money. *ib.*

So if money be stolen, and thief taken, he shall have restitution. *ib.*

Testator robbed, thief convict on procurement of executor, he shall have restitution. *ib.*

If goods be stolen, and by thief sold in market-overt, thief

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being convicted on evidence of party robbed, he shall have restitution of this *act* of thing sold. *Pages 542 to 547*

By 31 *Eliz.* notwithstanding sale of a horse in market-overt, owner may take him within six months after the felony on proof of his property, which shews that after six months he shall not have restitution. *543*

Scrivener's shop no market-overt [for plate] by custom of *London.* *ib.*

By 31 *Eliz.* & 1 *Jac.* *no sale of stolen goods* in *London*, *Westminster*, or *Southwark*, or *within two miles to a broker shall change the property.* *ib.*

Shops in *London* a market-overt [with respect to goods usually sold therein.] *543, 544*

Whether a sale in market-overt had barred restitution in appeal. *544*

A. commits a robbery, *king's* officer seizeth goods stolen, and sells them in market-overt, party robbed convicteth *A.* on his appeal, he shall have restitution if he made fresh suit. *ib.*

If offender be convict on evidence of party robbed, or owner, he shall have restitution, tho there were no fresh suit, or any inquiry by inquest touching the same; but *contra* in appeal. *545*

Owner prefers indictment against the thief, who flies, and is thereon outlawed, owner shall have restitution. *ib.*

Two persons have their several goods stolen, tho thief convicted on the prosecution of one of them, the other must prosecute his indictment in order to have restitution of his goods. *545. ii. 252*

Antiently if *C.* was attaint on indictment preferred by *A.* and reprieved till another sessions, and then *B.* preferred indictment of another robbery committed on him by *C.* *C.* might if he would have pleaded to the country, and on conviction *B.* should have had restitution; but he might have pleaded *auterfoits attaint*, and have refused to have answered, and then *B.* should have had no restitution; but by 21 *H.* 8. court ought to inquire by inquest of office touching robbery of *B.* and being ascertained thereby to grant restitution. *545, 546. ii. 252*

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it is a taking, and so if *B.* refuse, and *A.* pray a loan or gift of money, which *B.* gives or lends, robbery. *Page* 533

So if *B.* throws his purse in a bush, and *A.* takes it up, and carries it away, so if *B.* flying from thief let fall his hat, and thief takes it, and carries it away, all effect of same fear. *ib.*

If a thief without weapon drawn bid party deliver his purse, which he doth, robbery, tho finding little in it he return it. *ib.*

A.'s purse being fastened to his girdle, *B.* assaults him to rob him, and in struggling girdle breaks, and purse falls to the ground, no robbery; but if *B.* take up the purse, or if *B.* had purse in his hand, and then girdle breaks, and striving lets purse fall to the ground, and never takes it up again, robbery. *ib.*

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That when he went with a troop of captains and others from his house into the city, and there prayed aid of the citizens in defense of his life, and to go with him to the court to bring him into the queen's presence with a strong hand, so that he might be powerful enough to remove certain of his enemies attendant on the queen, it was treason, the fact in London rebellion. ib.

That the adherence of *earl of Southampton* to *earl of Essex* in London, tho he knew not of any other purpose than of a private quarrel, which *Essex* had against certain servants of the *queen*, was treason in him, because a rebellion in the earl of *Essex*. ib.

That all they, that went with *Essex* from his house to London, whether they knew of his design, or not, were traitors, whether they departed on the proclamation, or not; but that those, that suddenly adhered to him in London, and departed on proclamation made, ought to be pardoned. ib.

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- Who shall be said an enemy; jury on trial shall inquire, whether the person to whom the party indicted adhered was a war between *king* of *England* and that other prince, whereunto party adheres. 164
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If offense committed in county, where *B. R.* sits, and indictment be taken there, *B. R.* may proceed *de die in diem*, and there need not fifteen days between *teste* and return of *venire*. ii. 3, 360

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Of *venire fac.* issuing out of *B. R.* how to bear *teste*, &c.

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Justices of *oyer* and *terminer* issue a general precept for the return of twenty-four jurors to try the issue between *king* and prisoners to be arraigned. ii. 26, 27, 260, 261

After the prisoners are arraigned, and have pleaded to the country, a precept issues in nature of a *venire fac.* when such precept bears *teste*, and when returnable in whose name, and under whose seals, it must be. ii. 261

If they make it returnable any day after the first day of sessions, they must make an adjournment, and record it. *ib.*

Justices of gaol-delivery after prisoner hath pleaded may take pannel from sheriff without making any precept to him. *ib.*

Whether process be by writ or precept, as well the award, as writ or precept must mention truly the *visne*, and where it is only by award without writ or precept, as in case of justices of *gaol-delivery*, the award ought to mention the *visne*. ii. 262

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Foreign pleas triable by a jury of same county, where party indicted, except in treason. ii. 239, 263

Tho *venire fac.* is only to return twelve, yet sheriff ought to return twenty-four, the general precept that issues before a sessions of *gaol-delivery*, *oyer* and *terminer*; and *peace* is to return twenty-four, but commonly forty-eight are returned. ii. 263

Several indicted for one felony, justices may issue one or several *venire fac.* or awards of that kind. ii. 263, 268

If it be joint, and one challenge twenty peremptorily, or for cause, jurors challenged shall be drawn against all, and so in appeal. ii. 263

Expedient to make out several *venire fac.* and if pannel be challenged off, yet forty *tales* may be granted on each *venire fac.* *ib.*

If *venire fac.* in appeal be once granted jointly, it cannot be severed, neither can there be several *tales*, for if *venire fac.* be joint, *tales* must be joint, and so in case of indictment. ii. 263, 264

Before justices of *gaol-delivery*, where only one award, tho at first it be joint, and pannel accordingly returned, and the prisoners challenge peremptorily severally, whereby there are not enough left on the pannel to try them, and a *tales* is awarded returnable the next day, yet court may sever first award, and also the *tales*. ii. 264

Record being made up, the award is made on the roll, which the justices of *gaol-delivery* may model, as they please, at any time before trial. *ib.*

On the writ or precept, or command to the sheriff he cannot return a *mandavi ballivo*, as in some cases of appeal, writ, &c. being for the king. *ib.*

The *analysis* of the writ of *venire fac.* *ib.*

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But if whole jury be challenged off, then there shall be a new *venire fac.* and if none appear, then a *distringas juratores* shall issue, and no *tales*. ii. 265

If a full jury appear, and before they are sworn, one of them dies, so that there remains not a full jury, a *tales* shall be granted; and so if a juryman dies after returned and swore. ii. 266

If a *tales* issue, and they do not appear full, or be challenged off, so that those, that appear on principal pannel and *tales* make not up a full jury, another *tales* may be granted. *ib.*

In felony a *tales* may be granted of a greater number than the principal pannel in respect of the challenges, so that there may be forty *tales*, or more; but if several succeeding *tales* be granted, the latter must be less in number than that which was next before, unless the array of the preceding *tales* be quashed, and then the number of the next may equal it. *ib.*

The times between *teste* and return of *tales* must be as in principal *venire fac.* *ib.*

If indictment be before justices of *oyer* and *terminer*, the *tales* as well as principal pannel ought to be in the name of three justices, and may be returnable *de die in diem*, or *de hord in horam* of same day. *ib.*

As to all other matters, they agree with proceedings in *B. R.* above-mentioned. *ib.*

Before justices of *gaol-delivery* no particular precept to return either jury or *tales*, but the general precept before the sessions and the award. *ib.*

And yet there is an instance before justices of peace and *gaol-delivery* of a *tales* granted returnable the next day. ii. 267

After *not guilty* received and recorded sheriff returns pannel of jury. ii. 293

Where trial of treason or felony shall be, *vide* COUNTY, COUNTY PALATINE.

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Vide ARRAIGNMENT, CERTIORARI, CHALLENGE, COURT, EVIDENCE, GAOL-DELIVERY, INDICTMENT, JURISDICTION, JUSTICES OF ASSISE AND NISI PRIUS, JUSTICE OF PEACE, KING'S BENCH, OYER AND TERMINER.

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VERDICT.

On indictment of treason *in adhering to king's enemies*, what jury shall inquire of. Page 164

In all cases of infancy, insanity, &c. if one incapable to commit a felony be indicted by the grand inquest, and thereon arraigned, petit jury may either find him *not guilty*, or find the matter specially, and how, and thereon court gives judgment of acquittal. 28 ii. 303

But if one in such case be arraigned on indictment of murder or manslaughter by coroner's inquest, there if party committed the fact, regularly the matter ought to be specially found, because if the jury find him *not guilty*, they must inquire how party came by his death, and how in that case they must find. *ib.*

But if he be first arraigned, and acquitted on the indictment by the grand inquest, and found *not guilty*, he may plead that acquittal on his arraignment on the coroner's inquest, and that will discharge him, and petit jury shall inquire farther how he came by his death. 39

If prisoner indicted of murder or manslaughter by grand inquest be acquitted by petit jury, they say so and no more, and only inquire of the flight; but if acquitted on pleading to coroner's inquest, petit jury also find, who killed the party, if they do not know, how in that case they find.

ii. 64, 65, 300, 301, 304, 305

If indictment be of murder or manslaughter, and on trial it appear to jury to be involuntary, (as *per infortunium*, or *se defendendo*) jury ought to find the special matter, and conclude, *Et sic per infortunium*, &c. and not generally, that it was *per infortunium*, &c. for on the special matter found court may give judgment against conclusion of verdict. 471, 476, 477. ii. 302

If jury find him *not guilty*, they must inquire, whether he fled; and if they found he did fly, they must inquire of his goods and chattels, which is an inquest of office and traversable.

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Where one of full age shall be found guilty of burglary, and an infant, who was principally concerned in it, *not guilty*. 556

Baron shall be found guilty, where *feme* in his presence, and by his coercion commits burglary, or larceny, but she shall be acquitted. 45, 516, 556

If indictment comprises burglary and felony, prisoner may be acquitted of burglary, and convicted of felony within clergy, or he may be acquitted of the felony; but *quære*, whether he can in that case be convicted of burglary.

559, 560. ii. 302

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- Where burglary felony, and felony on 5 & 6 *E.* 6. are joined in one indictment, prisoner may be acquitted of one, and convicted of the other two. *Page* 560
- If he be found guilty of burglary, and not of stealing, he may be convicted of burglary; and if acquitted of burglary, he may be convict of felony within 5 & 6 *E.* 6. and if acquitted thereof, he may be convict of larciny. 561
- If *A.* kills *B.* upon assault made on him in executing process, or in his own defense, in the highway, or in defense of his house against persons come to rob him, on *not guilty* pleaded, he ought to be acquitted. ii. 158, 303
- In treason or felony, if any *eschete* or forfeiture of land be conceived in the case, petit jury ought to find true time of offense committed. 361. ii. 179, 291
- In petit treason prisoner may be acquitted thereof, and be convict of murder or manslaughter. ii. 184
- Where there was once a writ [of exigent,] and record since lost, on circumstances the jury may find the record, tho not shewn in evidence. ii. 207
- Where two indictments for same fact; one of murder, the other on 1 *Jac. of stabbing*; how jury to find. 468. ii. 239, 240
- If duress and compulsion will excuse the prisoner, jury on general issue ought to find accordingly. ii. 258, 259
- If *A.* be indicted for a robbery or murder in wrong county, he ought to be acquitted, but variance between indictment and evidence in the vill immaterial. ii. 291
- If verdict be given by mistake or partiality, jury may rectify it before recorded, or by advice of court go together again, and reconsider it. ii. 299, 300
- If recorded, they cannot retract or alter it. ii. 300
- In felony or treason no privy verdict can be given. *ib.*
- If one be indicted *de morte cujusdam ignoti*, jury shall be charged to tell his name, if they can. *ib.*
- Where prisoner was acquitted of robbery, court antiently compelled jury to present who did it, but now *contra*. ii. 300, 301
- If coroner's inquest *super visum corporis* present a *fugam fecit*, and party be arraigned, and plead to that indictment, jury not charged to inquire of the flight, and why. ii. 301
- Jury may find a special verdict, or may find prisoner guilty of part, and not guilty of the rest, or find him guilty of the fact, but vary in the manner. ii. 301, 302
- One indicted of robbery may be found guilty of felony, and not robbery. ii. 302
- So where indictment charges the larciny to be *clam & secretè a personâ*. *ib.*

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One indicted on 1 *Jac. of stabbing contra formam stat.* may be acquitted on the *act*, and convicted of manslaughter.

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One indicted of grand larceny may be convicted of petit larceny. *ib.*

One indicted of murder may be convicted of manslaughter. *ib.*

Where coroner's inquest found that it was *per infortunium*, and jury found him generally *not guilty*, the fact appeared to be *infotunium*, verdict of *not guilty* recorded.

ii. 303

If coroner's inquest find not the special matter, but murder or manslaughter, and prisoner is arraigned on it, and pleads *not guilty*, and on evidence it appears that the prisoner killed the man, but not feloniously, in this case jury cannot find a general *not guilty*, but must find that the prisoner did it, and the manner how, and this to be entered of record, as in case of a verdict, *se defendendo*.

ii. 304, 305

Many special verdicts have been found, as on 1. *Jac. of stabbing* so on the point, *whether murder or not*; but it is difficult to find them so that judgment be given for murder, and why.

ii. 305

Rarely on any special verdict, where question *murder or manslaughter*, judgment given for murder, but commonly manslaughter. *ib.*

Felony laid as required by *act* ousting clergy, but evidence comes not up to it, where prisoner shall be convicted of simple felony.

ii. 336

Where verdict avoided for misdemeanors of jury, &c. the special matter being indorsed on the postea, *Vide petit jury* sub titulo JURY.

Vide EVIDENCE.

VERGE.

For commissions of oyer and terminer for the verge, the extent thereof, and manner of trials within the same, *Vide COURT.*

VISNE.—*Vide TRIAL.*

USE.—*Vide FORFEITURE, STATUTES IN GENERAL.*

WAIFS.

If a felon waive the goods stolen without any pursuit after him, those goods are not in law *bona waviata*, nor forfeit to the king or lord; but if he waive them on pursuit, then they are *bona waviata*, and forfeit to the king or lord. 541

This forfeiture is not like a stray, where, tho the lord may seize, yet owner may retake them, within year and day; but here true owner cannot seize his own goods, tho on fresh suit within year and day. 541

WAIFS.—*Continued.*

How a man shall obtain restitution of goods waived. *Page* 541
 WALES.

Before 26 *H. 8.* no treason or felony committed in *Wales* was inquirable or triable before justices of *oyer or terminer*, or in *B. R.* in *England*, but before justices assigned by the *king* in those counties of *Wales*, where fact committed. 156

But by the same *act*, what offenses and accessaries of the same, feloniously done in *Wales*, or any lordship marcher may be inquired of, and tried before justices of gaol-delivery and the peace, in next adjacent county.

156, 157. ii. 38.

This *act* confirmed by the great statute of *Wales* 34 & 35 *H. 8.* which settles the grand sessions and justices thereof. 157

As to offenses mentioned in 26 *H. 8.* justices of gaol-delivery in the adjacent counties, and what counties these are, had thereby a concurrent jurisdiction with the justices of grand sessions. *ib.*

But whether 26 *H. 8.* extended to treason for compassing *king's* death, or levying war, or whether same remained only triable by justices of grand sessions, doubtful; but now 26 *H. 8.* stands repealed by 1 & 2 *P. & M.* as to trial of treasons. 157, 282. ii. 38

In other criminal causes not capital, as in indictments of riots, they may be removed into *B. R.* by *certiorari*; and when issue is joined they may be tried in next *English* county. *ib.*

Whether a *certiorari* lies into *Wales* on indictment of treason or felony. 158

It seems it may issue for special, and what purposes, but not as a trial of fact, but it shall be sent down by *mittimus* according to 6 *H. 8.* *ib.*

Wales within realm of *England*, and therefore not within 35 *H. 8.* for trial of foreign treasons. *ib.*

WAR.

Jus gladii, both civil and military, and so is power of making peace, *inter jura summi imperii*; none can levy war here without the *king's* commission. 130, 159

War succeeds best when concerted with the parliament. 159

What shall be said enemies of the *king*, subjects not properly *hostes*, but rebels or traitors *ib.*

The several kinds of peace. 159, 160

A truce described. 159

A league explained, and distributed into its several kinds. 159, 160

Ubi bellum non est, pax est. 160

War by the *Spaniards* on the *Indians* under pretence of religion, injurious, tho there intervened no former articles of peace between them. *ib.*

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When the *king's* courts are open, it is time of peace in judgment of law. Page 347

In time of war, if one enemy plunder or rob the house of another, it is only an act of hostility. 565

Offenses of this kind, committed on some of same party, or others who are not in an hostile state, are felonies. *ib.*

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WARRANT.

For warrants to arrest felons, vide ARREST, JUSTICE OF PEACE.

For warrants to search for stolen goods, vide JUSTICE OF PEACE.

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WARREN.—*Vide* PARK.

WERA, or WEREGILD.

Amongst the *Saxons* a commutation of judgment of death in case of homicide; but if party insolvent, he was to suffer death. 7, 8

How long this custom prevailed, and how it came to surcease. *ib.*

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Before 1 *Jac.* it was not felony, because it wanted a trial [how far 1 *Jac.* derogated from by 9 *Geo.* 2. vide *act.*] 429

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WITNESS.

Whether 5 & 6 E. 6. requiring two witnesses on trial and indictment of treason extends in law to new treasons made after the *act*. Pages 297, 321. ii. 287, 288

If a new treason were made by a subsequent *act* without any clause directing indictment or trial in any other manner than is appointed by this *act*, there must be two lawful accusers, both on the indictment and trial. *ib.*

If there be by a subsequent *act* any derogatory clause from this *act*, then there need not be two witnesses. *ib.*

Whether by any *act* this be repealed or derogated from with respect to indictment or trial. 297 to 301

As to *counterfeiting coin, or so much as was treason for impairing it*, by 1 & 2 P. & M. it is expressly provided, that no other evidence shall be requisite, either on indictment, or trial, than was before 1 E. 6.

221, 297, 298. ii. 287

As to clipping and washing, 5 & 18 Eliz. in express terms require only a conviction and attainder, *according to the order and course of the law*, and 5 & 6 E. 6. is so far derogated from by these *acts*. *ib.*

As to *all other treasons than counterfeiting, clipping, and washing coin*, 1 & 2 P. & M. hath taken away necessity of two witnesses on trial, but whether it hath taken away necessity of two witnesses on indictment.

297 to 301, 324. ii. 286, 287

In misprision of treason two witnesses necessary, both on indictment and trial. 300

What shall be said two lawful witnesses within 5 & 6 E. 6. 301 to 307

[By 7 W. 3. *no person shall be indicted, tried, or attainted of treason, but on the oaths of two lawful witnesses, which two witnesses must be to same treason, tho not necessary that they should both be to same overt-act; in notis.*] 341

Lawfulness of witnesses respects either the persons or testimony of the witnesses. 301

Where *feme* a lawful witness against *baron*, or not. 302. ii. 279

She is not bound to swear against another in theft, if her husband was concerned, tho not directly against him. 301

A woman taken away and forcibly married, *contra* 3 H. 7. may be sworn against her husband; but otherwise, if she assent to the marriage by free cohabitation.

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One having a promise of the goods or lands of a party attainted, no lawful witness to prove the treason. 303

A person outlawed in trespass a witness, tho no lawful jury-man. *ib.*

A father or son, or master or servant, a lawful witness for his correlative. 303. ii. 276

An adversary in a suit a good witness. 303

A *particeps criminis* in some cases a lawful accuser within 5 & 6 E. 6. *ib.*

An approver shall be sworn to his appeal, but whether on the trial, if appellee puts himself on his country.

303. ii. 234

Two charged with a crime, one shall not be examined against the other, except he confess himself guilty. *ib.*

The party that is to be a witness against his accomplices never indicted, because he doth weaken his testimony, tho not take it away. 303, 304, 305

A party to the treason who hath confessed it, may be one of the two accusers in case of treason, and is sufficient to satisfy 5 & 6 E. 6. 304

A promise of pardon to a party to the treason if he will discover the plot, no impediment to his testimony; but if the *king* promise a pardon on condition that if he will witness against any others, he will pardon him, and that be acknowledged, whether it will make him incapable.

304. ii. 280

Hard to take away life on the evidence of a party to the crime singly, unless there be strong circumstances. 305

A remainder man expectant on an estate-tail, not a good witness; but a disseisor may be a witness to a deed made to the tenant. 306

One convict of conspiracy, perjury, or forgery, not a lawful witness; *contra*, if he be pardoned. *ib.*

Trespass against *A. B.* and *C.* if no evidence be given against one to prove him guilty, he may be examined on the part of the other defendants; and if two be indicted, and there be no evidence against one, whether he may not be a witness for the other; but otherwise it is, if there be a colourable evidence against him. 306, 307

Wife may be an evidence against her husband indicted for aiding another to commit a rape on her. 629

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Second wife married, leaving the former, may be a witness against the husband, but not the first wife. *693*

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He that alledgeth an exception of record, ought to shew forth a copy of the record attested, or vouch the roll in court.

ii. 278

If *king* pardon incompetent witnesses, they are rendered competent, tho their credit shall be left to the jury. *ib.*

Whether an infidel be a competent witness; a *Jew* may be such. *ii. 279*

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Consequential benefit to the witness disables not his testimony, tho it may abate his credit. *ii. 280, 281*

Three actions severally brought against three persons for perjury, on the same point, on trial of the first action, the other two are competent witnesses being not immediately concerned, tho consequently the point being the same.

ii. 280

So where indicted of perjury on three several indictments touching same matter, while the other two stands unconvicted, they may be examined. *303*

Where one not a witness, because his own suit. *ii. 281, 285*

Appellant nonsuit on appeal may be a witness for the *king*.

ii. 282

Where *king's* testimony allowed or not. *ib.*

Witnesses are brought in by *subpœna* issued by justices of peace, *oyer* and *terminer*, *gaol-delivery*, or *B. R.* where the plea triable. *ib.*

Or the justices that take examination of the accused, and information of witnesses, or the coroner that doth the same, may at that time, or any other time after, and before trial, bind over the witnesses to appear at the sessions, and in case of refusal either to come, or be bound over, may commit them for contempt. *ii. 52, 282*

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